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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 630

LUTHER SPIERS,

Petitioner,

versus

CONSOLIDATED COMPANIES, INC, ET AL.,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Louisiana

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SUPREME COURT OF THE UNITED STATES

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Luther Spiers, prays that a writ of certiorari be issued, to review the final judgment of the Supreme Court of the State of Louisiana, which reversed the judgment of the Court of Appeal of Louisiana, First Circuit, which had affirmed the verdict of the jury in the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana, awarding to plaintiff judgment in the amount of $50,000.00, plus interest and costs for personal injuries.

CITATION TO OPINIONS BELOW

The judgment of the trial court (19th Judicial District Court) is printed as Appendix "A" hereto, infra, p. 11.

The reasons of the presiding trial judge for overruling defendants' motion for new trial is printed as Appendix "B" hereto, infra, p. 12.

The original opinion of the Court of Appeal of Louisiana, First Circuit, is reported in 125 So. 2d 795, and appears in the original record and is printed as Appendix "C" hereto, infra, p. 16.

The opinion on rehearing of the Court of Appeal of Louisiana, First Circuit, is reported in 125 So. 2d 795, 810, and appears in the record and is printed as Appendix "D" hereto, infra, p. 45.

The opinion of the Supreme Court of the State of Louisiana is reported in 132 So. 2d 879, and appears in the record and is printed as Appendix "E" hereto, infra, p. 72.

JURISDICTION

(1) The judgment of the Supreme Court of the State of Louisiana was entered on June 29, 1961, p. 72, infra. Rehearing was denied on October 5, 1961, application therefor having been timely filed on July 10, 1961.

(2) The jurisdiction of this Court is invoked under Rule 19 of the Supreme Court of the United States which provides, in part:

"CONSIDERATIONS GOVERNING REVIEW OF CERTIORARI

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or had decided it in a way probably not in accord with applicable decisions of this Court."

and under 28 U. S. C., Sec. 1257, which provides in part:

"3. By writ of certiorari, where . . . any title, right, privilege or immunity is specially set up or claimed under . . . the Constitution, treaties or statutes of . . . the United States."

(3) The Supreme Court of the State of Louisiana is the highest court in that state and the judgment of which review is sought is a final judgment of the Supreme Court of the State of Louisiana.

(4) The question of substance here presented and on which review is sought is whether or not a state court can deny to petitioner due process of law by applying standards of negligence in conflict with decisions of Federal Courts on the same point and governing the standards of operations of an interstate railroad and the rights of its employees in connection therewith.

(5) At issue here is whether a state court may declare, in a civil suit by an injured railroad employee against a negligent shipper, that an interstate railroad may contractually permit a shipper to intentionally block and obstruct its main line with immunity to the shipper for any injury resulting to the crew of the train, and thus permit an interstate railroad to impair the rights of their employees.

(6) This decision by the Supreme Court of Louisiana is in direct conflict with many decisions of the Federal Courts, among which are *Booth-Kelly Lumber Company v. Southern Pacific Company* (9th Cir. App. 6/28/50, Reh. Den. 8/11/50), 183 F. (2) 902; *Waylander-Peterson Company v. Great Northern Railroad Company* (Ct. App. 8th Cir. 11/20/53), 201 F. (2) 408; *Kennedy v. Pennsylvania Railroad Company* (U. S. D. C. Pa. 1/12/59), 169 F. Supp. 406; *Baltimore & Ohio Co. vs. Alpha Portland Cement Company* (3rd Cir. App. 1/10/55), 218 F. (2) 207.

(7) At stake here is the question of whether the economic burden of industrial accidents to a railroad employee where the primary negligence or fault lies with a third party shall be borne by the negligent party as set forth in the Federal jurisprudence cited above or whether the economic burden for such accidents can be shifted to a railroad engaged in interstate commerce by the state court.

STATEMENT OF THE CASE

Luther Spiers, a veteran railroad employee, filed suit against Consolidated Companies, Inc., and its liability insurer, the Travelers Insurance Company, for damages resulting from personal injuries sustained on October 16, 1956, when the

Louisiana and Arkansas Railway train on which he was working was caused to make an abrupt and sudden stop to avoid colliding with a truck owned by Consolidated Companies, Inc. which was parked across and blocking the main line on which the train was travelling in the City of Baton Rouge, Louisiana.

Suit was also filed in Federal Court against the railroad company which case was concluded by compromise, reserving to plaintiff herein the right to proceed against Consolidated Companies, Inc., et al.

The case was tried before a jury in the Nineteenth Judicial District Court for East Baton Rouge Parish, Louisiana, resulting in a verdict for plaintiff in the sum of $50,000.00. This verdict was later affirmed on appeal by the Court of Appeal, First Circuit of Louisiana. Writs of Certiorari were granted by the Supreme Court of the State of Louisiana which reversed the judgment in favor of plaintiff and rendered judgment in favor of defendants.

The basis of the decision of the Supreme Court of the State of Louisiana holding defendants free from negligence was that under the circumstances of this case (because of contract) it was not foreseeable to the shipper that a train travelling on the main line would be required to make an "emergency stop" because of an obstruction on the track placed there by defendant, Consolidated Companies, Inc.

This is in clear conflict with the established federal jurisprudence in such cases, supra, and presents a serious question affecting the rights of railroad employees, passengers, ship-

pers and others, who should be entitled to have some uniform jurisprudence regulating their work and travel on interstate railroads.

HOW THE ISSUES WERE RAISED BELOW

This issue was first raised below by oral argument and memorandum to the Court of Appeal, First Circuit of Louisiana, on application for rehearing after it was first suggested that a third party, by contract and custom, could insulate itself from liability to an injured railroad employee for blocking and obstructing the main line of an interstate railroad. At that time, and thereafter, the uniform federal jurisprudence on this question has been cited to the courts in brief and in oral argument.

ARGUMENTS AND AUTHORITIES

Can a shipper, by contract and/or custom with the railroad carrier, insulate itself from liability to a veteran railroad employee injured when the train on which he was working was required to make an emergency stop because of an **intentional obstruction** of the main line of an interstate railroad by the Shipper? **Can this veteran railroad employee be denied protection and compensation for loss and damage by a contract or custom between carrier and shipper, and to which contract or custom he was not a party?** The Supreme Court of the State of Louisiana has held as a matter of law that this can be done; refusing to follow the uniform federal jurisprudence dealing with similar cases. *Booth-Kelly Lumber*

Company v. Southern Pacific Company (9th Cir. App. 6/28/50, Reh. Den. 8/11/50), 183 F. (2) 902; *Waylander-Peterson Company v. Great Northern Railroad Company* (Ct. App. 8th Cir. 1/20/53), 201 F. (2) 408; *Kennedy v. Pennsylvania Railroad Company* (U. S. D. C. Pa. 1/12/59), 169 F. Supp. 406; *Baltimore & Ohio Co. v. Alpha Portland Cement Company* (3rd Cir. App. 1/10/55), 218 F. (2) 207.

This case was tried before a jury demanded by the shipper. That jury found the shipper guilty of negligence causing this plaintiff the injuries of which he complained. This finding of fact and of law was later affirmed by the Court of Appeals, First Circuit of Louisiana.

The Supreme Court of the State of Louisiana granted Writs of Certiorari and Review and reversed this decision, holding that the defendant was not negligent in intentionally blocking the main line of this railroad since it was not "foreseeable" that blocking the main line might cause a train to make an "emergency" stop. This decision was made despite the provisions of the spur track agreement between the carrier and the defendant (shipper) which specifically provided:

> "13. Carrier agrees to permit Shipper and assigns to use the space between Carrier's main line and the proposed spur track as a private driveway between hours of 6 a.m. and 6 p.m., it being expressly understood that this shall not constitute a dedication of this property to public use but is for the sole benefit of Shipper and assigns. Any vehicle using driveway shall at all times have a driver in charge so as to immediately move said vehicle on the approach of trains or as otherwise necessary • • •."

It is well established that in suits by injured railroad employees against their employers standards or tests of negligence are to be uniform and according to federal jurisprudence, regardless of the law of the State in which the case is tried or the accident occurs. *Urie v. Thompson*, 1949, 337 U. S. 163, 69 S. Ct. 1018, 93 L. Ed. 1282.

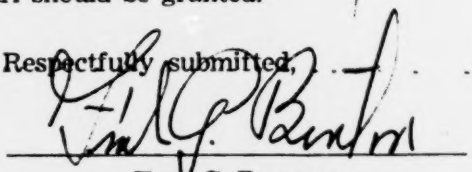
The federal jurisprudence on the question of negligence in this case is clear and requires judgment in favor of plaintiff and against defendants. To permit this defendant-shipper, **by contract or custom with the carrier** (and over which this railroad employee had and has no control) to escape the application of these uniform rules of negligence and to insulate itself from liability to the railroad employees and, indeed, the fare-paying passengers is a denial of due process of law. There is no escape from the fact that if the decision of the Louisiana Supreme Court is permitted to stand then a railroad engaged in interstate commerce can by contract impair the rights of not only railroad employees but fare-paying passengers traveling in interstate commerce.

The effect of this decision is so far-reaching and important to railroad employees and the travelling public that a review of this decision should be made to clarify this crucial issue. It is of paramount importance to the railroads engaged in interstate commerce as the effect of this decision is to cast the entire economic burden for industrial accidents to railroad employees on the shoulders of the railroad employer even though primary responsibility lies with a negligent third party from whom indemnification could be secured.

CONCLUSION

For the foregoing reasons, we respectfully submit that this petition for certiorari should be granted.

Respectfully submitted,



FRED G. BENTON

Baton Rouge, Louisiana

December 22, 1961.

CERTIFICATE

I, of counsel for petitioner, do hereby certify that I have this day served a copy of the foregoing petition for writ of certiorari by mailing a copy of the same, first class, postage prepaid, to counsel of record for defendants, as follows:

Mr. Charles W. Phillips
Taylor, Porter, Brooks, Fuller & Phillips
Attorneys at Law
11th Floor, Louisiana National Bank Building
Baton Rouge, Louisiana
Counsel of record for
The Travelers Insurance Company

Mr. Richard C. Cadwallader
Attorney at Law
Louisiana National Bank Building
Baton Rouge, Louisiana
Attorney of record for Consolidated
Companies, Inc.

Dated this 22nd day of December, 1961.

Of Counsel

APPENDIX "A"

LUTHER SPIERS	:	Number 62,222, Division "C"
vs.	:	19th Judicial District Court
CONSOLIDATED COMPANIES, INC., ET AL	:	Parish of East Baton Rouge
	:	State of Louisiana

JUDGMENT

This cause having been heard and tried before a jury duly empaneled and acting in accordance with all of the formalities prescribed by law; and the case having been duly submitted to the jury after the jury had received the evidence and heard the testimony of the witnesses and the arguments of counsel, and had been charged by the Court; and the jury after due deliberations having brought in a general verdict in favor of the plaintiff, Luther Spiers, and against the defendants, for the sum of Fifty Thousand and No/100 ($50,000.00) Dollars, and the law and the evidence having been found by the jury to be in favor of the plaintiff, Luther Spiers, and against the defendants, Consolidated Companies, Inc., and The Travelers Insurance Company:

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the plaintiff, Luther Spiers, and against the said defendants, Consolidated Companies, Inc. and The Travelers Insurance Company, in solido, in the full and true sum of Fifty Thousand and No/100 ($50,000.00) Dollars, and for all costs of Court.

JUDGMENT RENDERED, READ AND SIGNED in open Court at Baton Rouge, Louisiana, on this the 22nd day of June, 1959.

(sgd) JESS JOHNSON
Judge, 19th Judicial District Court

CERTIFICATE

I certify that a copy of the foregoing judgment was this day delivered to the office of C. W. Phillips, Esquire, 11th Floor, Louisiana National Bank Building, Baton Rouge, Louisiana, and another copy was this day delivered to the office of Richard C. Cadwallader, Louisiana National Bank Building, Baton Rouge, Louisiana, they being of counsel for defendants herein.

Baton Rouge, Louisiana, this 22nd day of June, 1959.

(Sgd) C. E. HARDING
Of counsel for plaintiff

APPENDIX "B"

LUTHER SPIERS	:	Number 62,222, Division C
vs.	:	19th Judicial District Court
CONSOLIDATED COMPANIES, INC., ET AL	:	Parish of East Baton Rouge
	:	State of Louisiana

NOTES ON ORAL REASONS FOR OVERRULING MOTION FOR A NEW TRIAL

No record was made of the oral reasons given by the Court in overruling the motion for a new trial. Later counsel for defendant, The Travelers Insurance Company, requested the Court to reduce the reasons to writing. It would be entirely impossible to remember exactly what was said by the Court, but with the aid of counsel I hereby note some,

but I am sure not all, of the statements made by me in refusing to set aside the verdict of the Jury and grant a new trial.

When Mr. Dameron, of counsel for plaintiff, in his argument to the Jury at the end of the trial, read provisions of the Criminal Code at Title 14, Sections 96 and 97, pertaining to the offense of obstruction of a highway of commerce, and when an objection was made by counsel for one of the defendants, I instructed the Jury that this was a civil proceeding for money judgment and not a criminal prosecution for violation of the criminal laws, and that different rules and procedure were applicable. I feel sure that the reading of the criminal statute with my special instructions at that time was not prejudicial to the defendants in the minds of the Jury.

Counsel for both sides questioned each juror on his voir dire about many subjects and their views thereon. I did not know anything about the complaint now made that one of the jurors accepted had been convicted at one time of a criminal offense. Counsel for mover states that he learned about it during the progress of the trial. I do not question the statement of counsel as to when he first learned of that fact, but if it is true that this juror had been convicted of a criminal offense then it is my belief that greater diligence on the part of somebody could have ascertained that fact, on this subject. I think the objection now comes too late. The motion here under consideration indicates that the Juror had been convicted of embezzlement of some $5.00 under a Federal statute. The nature of the offense would have been cause to challenge the juror at the proper time, but such conviction does not disqualify the juror after he has been sworn and served throughout the trial, nor does the service on this Jury after

having been so convicted render this judgment a nullity. Moreover, the juror may have been guilty under the Federal statute and by the same proof he may not have been guilty under the State statute.

My general instructions to the Jury on the subject of their consideration of the evidence explained clearly that the Jury was the sole judge of the evidence and the weight to be given it and that the Court had nothing to do with that. I also explained that the Jury was the sole judge of the application of the law, but that they must take the law as given them by the Court. I say now, but did not say this to the Jury, that if I were a member of the Jury or sitting alone as the Court I might have given serious or weighty consideration to some of the points raised here by this motion. In many particulars the evidence was not convincing to me.

In cases tried before a Jury I have been reluctant to set aside the Jury's verdict unless the evidence was glaringly inadequate to support the verdict. I have done so in some cases, but not many.

As to the medical evidence in this case, who is there to say that Spiers did not suffer a hernia as a result of the alleged accident? Who is there to say that he did not have a heart attack as a result of the jerk of the train, the result of the hernia, or the strain of coughing and vomiting spells that followed the operation while he was in the hospital? The doctors are at odds on what caused the heart attack. Should I sit here and say to the Jury of twelve men that there is no evidence on which to base their verdict or that they improperly weighed the medical evidence? Personally I may have some

doubt of it, and I do, but even though the evidence is conflicting and the Jury follows one channel open to them, I am not going to set it aside.

As to the accident I could decide the question as to whether the engineer could or should have seen the truck on the track sooner than he did. Perhaps I could decide the question as to whether the train could or should have stopped without jolting Mr. Spiers. When the engineer first testified I thought he should have seen the truck sooner, but just what part that played in the Jury's consideration of the evidence I do not know. Anyway, I just cannot place myself above the Jury in this respect and unless there is such a wide margin between most convincing evidence on the one hand and the verdict of the Jury on the other, that I could say that there is not sufficient evidence and no reasonable basis for the verdict, but there is not that absence of reason for the verdict and I cannot set the verdict aside.

On the question of quantum, I think the Jury was generous but I do not feel justified in saying it was too much. I cannot say that the Jury gave $10,000.00 or $20,000.00 or any amount too much. This man may be able to do some kind of work, but I don't know and the doctors say he is disabled. Considering that the dollar today is not worth much and that he is disabled I am not going to say that the Jury gave him too much.

The motion for a new trial is overruled.

APPENDIX "C"

LUTHER SPIERS	:	Court of Appeal
vs.	:	First Circuit
CONSOLIDATED COMPANIES, INC., ET AL	:	State of Louisiana

APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, HONORABLE JESS JOHNSON, JUDGE, PRESIDING.

Before Ellis, Lottinger, Tate, Fruge and Landry

Landry, Judge

This matter presents the appeal of defendant Consolidated Companies, Inc., (hereinafter referred to simply as "Consolidated"), and its liability insurer, The Travelers Insurance Company, from a civil jury verdict in favor of plaintiff Luther Spiers, a railway conductor formerly employed by the Kansas City Southern and Louisiana & Arkansas Railway Company (hereinafter referred to simply as L & A), and judgment of the lower court predicated thereon in the sum of $50,000.00 for personal injuries allegedly sustained by plaintiff at or about 8:40 A.M., October 16, 1956, on which occasion plaintiff was violently thrown from his seat in the caboose of a long freight train operated by his employer when the train made an emergency stop within the city limits of the City of Baton Rouge, Louisiana, to avoid striking a truck belonging

to Consolidated and left standing upon the main line track of L & A.

Plaintiff's version of the incidents leading to the accident was set forth in an original petition filed October 15, 1957, and a supplemental and amended petition filed March 10, 1959. In the former it is alleged the accident occurred October 19, 1956, while in the latter the date of the accident is said to be October 16, 1956. The petitions relate that Consolidated, through a subsidiary known as Cash Grocery and Sales Company, maintained and operated a large warehouse situated on the east side of and adjacent to the L & A right of way in the block bounded by Main Street on the north and Laurel Street on the South. Plaintiff alleges (and the evidence shows) the L & A tracks run north and south immediately to the east of defendant's warehouse and make a rather long "S" curve to the south thereof. It is further alleged that the L & A has constructed a spur or side track along the western edge of its right of way parallel and adjacent to defendant's warehouse for the specific purpose of serving defendant's business with direct access to railway facilities. The pleadings allege that to the east of this spur track is situated the main line track of the L & A Railway which the evidence shows is located approximately 12 feet east of the aforementioned spur. Plaintiff next sets forth that on the morning of the accident, a freight car was standing near the south end of defendant's warehouse (a few feet north of Laurel Street) and a truck belonging to defendant was backed up to the door on the east side of the box car to either load or unload same and was positioned in such manner that it was at a right angle to the box car with its front wheels extending beyond both rails of the main line of the railroad blocking or, in railroad parlance,

"fouling" the main line. It is averred in the petitions that L & A train No. 42, (a freight train consisting of 3 diesel engines drawing a string of approximately 120 freight cars and the caboose in which plaintiff was riding), traveling northerly along the main line en route from New Orleans, Louisiana, to Alexandria, Louisiana, at a speed of approximately 8 miles per hour, approached the impediment thus created but, because of the curve in the track and the presence of a house and tree adjacent to the east side of the right of way, the engineer could not observe the obstruction in time to make a normal stop. Plaintiff alleges that in order to avoid striking the truck, the engineer "bigholed" the train (a railroad idiom meaning an emergency stop) resulting in plaintiff being violently ejected from his seat in the caboose and thrown to the floor as a result of which plaintiff sustained a right inguinal hernia.

The petition continues by relating that subsequent to the accident, plaintiff was hospitalized for a hernioplasty and while in the sanitarium recuperating therefrom he experienced vomiting and chest pains but was permitted to return home within four or five days following the surgery. Plaintiff then alleges that on November 9, 1956, he suffered a nearly fatal myocardial infarction or coronary thrombosis (in lay language a heart attack) which has rendered him totally and permanently disabled to perform his occupation as railway conductor and thereby necessitating his resignation from his former employment in such capacity. It is specifically alleged in plaintiff's petition that the action of defendant's employee in fouling the main line was in express violation of the terms of an agreement entered into by and between defendant and L & A on August 31, 1933, in which defendant is given the right to use the railroad right of way between Laurel and

Main Streets, and more particularly paragraph 13 thereof.[1] Finally plaintiff alleges his present disability (admittedly resulting solely from his present heart condition) is either the direct result of the injury sustained in the accident of October 16, 1956, or the accident caused the hernia necessitating the hernioplasty of October 27, 1956, and the myocardial infarction which followed the operation was a post operative complication either causing the infarction or aggravating a previous asymptomatic condition to the extent of producing disability which did not exist theretofore.

Defendants filed exceptions of no right and no cause of action which do not appear to have been passed upon in the lower court. These exceptions have not been argued before us either orally or in brief and are, therefore, presumed to be abandoned.

In answer to plaintiff's original and supplemental petitions, defendant in effect denied the occurrence of the accident and alleged that with the knowledge and consent of the L & A defendant, its employees and customers have, since the year 1933, used that portion of the railroad right of way lying between Laurel and Main Streets, and particularly the part

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[1] Carrier agrees to permit Shipper and assigns to use the space between Carrier's main line and the proposed spur track as a private driveway between the hours of 6 A.M. and 6 P.M., it being expressly understood that this shall not constitute a dedication of this property to public use but is for the sole benefit of Shipper and assigns. **Any vehicle using driveway shall at all times have a driver in charge so as to immediately move said vehicle on the approach of trains or as otherwise necessary.** Shipper assumes responsibility for and agrees to save and hold harmless Carrier from any loss or damage to Shipper's employees or property resulting from the use of this private driveway howsoever occurring. Carrier shall have the right to install gates for the purpose of closing this driveway and Shipper obligates itself to keep said gates closed at all times when said driveway is not being actually used by it.

thereof adjacent to its warehouse, as a private driveway pursuant to the provisions of the agreement referred to in plaintiff's petition. In substance, defendant further alleged it had no knowledge of the accident of October 16, 1956, until approximately 11 months thereafter when defendant received a letter from plaintiff's attorney dated September 18, 1957, wherein amicable demand was made on behalf of plaintiff. Defendant contends its defense is made more onerous because of the conflicting dates upon which the accident is alleged to have occurred and no report of such an incident was ever made to defendant by any of defendant's employee's. The answer next points out that in addition to the case at bar, plaintiff filed suit in the Federal Court,[1] wherein plaintiff sought recovery from his employer of the sum of $200,000.00 for injuries received while in the course of his employment and resulting from two accidents, one said to have occurred in mid September, 1956, and the other on October 19, 1956, both of said accidents allegedly resulting from the negligent acts of railroad employees.[2] Defendant further relates that it was

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[1] Luther Spiers
Vs.
La. & Ark. Ry Co.
No. 1933 on Docket of
District Court of United States
Eastern District of Louisiana
Baton Rouge Division

[2] Paragraphs 5, 6, 7, 8, 9, 10 and 11 of the Federal Court suit read as follows:

5.

On a date not definitely known to plaintiff, but believed by him to have been approximately in the middle or shortly after the middle of the month of September, 1956, while acting in the course of his employment by defendant in Rapides Parish, near Alexandria, Louisiana, plaintiff suffered injury.

6.

Plaintiff was injured when, while carrying a lantern and waybills he was endeavoring to board a caboose on a freight train, in

the performance of his duties, and he fell injuring his right foot and leg and his right side; plaintiff did not then believe he had been seriously injured, and after resting continued his duties for defendant.

7.

The said fall above described was due to negligence on the part of defendant in failing to furnish plaintiff a safe place to work, and in requiring that he board or catch a moving caboose in the night time while encumbered with a lantern and waybills, and was due to negligence of defendant's engineer in having failed properly to judge or estimate the length of the train and in running the train too fast at that point despite the fact that he knew that plaintiff in performing his duties was required to board the caboose, and to negligence of defendant in failing to have seen to it that its engineer was properly advised as to the length of the train, and to other negligence of defendant and its officers, agents, and employees not here detailed.

8.

On or about October 19, 1956, in East Baton Rouge Parish, Louisiana, in the City of Baton Rouge, Louisiana, while in the course of his employment by defendant, and performing duties for defendant, plaintiff was involved in an accident and sustained injury to his body; plaintiff while riding in a caboose of a freight train operated by defendant, in the performance of the duties of his employment, was suddenly thrown forward when the train was brought to a sudden and abrupt stop; although he endeavored to continue his employment he felt gradually worse and on or about October 22, 1956, while in Alexandria, Louisiana, he advised a Yard Master of defendant of the accident that occurred on or about October 19, 1956, said that he believed he had sustained a rupture, and was given a written order to report to a physician employed by defendant, for examination.

9.

Plaintiff reported to the doctor, gave the doctor a history of vomiting and of having pain in his chest, and was examined by means of stethoscope and by having his blood pressure taken, was given a prescription, and advised the doctor that he thought he was ruptured and was examined for hernia and was told that he did have a hernia and needed immediate operation.

10.

Thereafter plaintiff entered Baton Rouge General Hospital at Baton Rouge, Louisiana and was operated on for hernia October

drawn into the Federal Court suit by third party petition filed by L & A subsequent to which development plaintiff compromised the suit against L & A for the sum of $20,000.00, reserving his rights against present defendant but reducing his demand against defendant to the sum of $50,000.00. In substance, defendant alleged that if its truck did in fact foul the main line as plaintiff contends, such action was not negligence in view of its agreement with L & A and its constant use of the right of way subsequent thereto. Defendant further

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27, 1956, and he developed vomiting and chest pain, subsequently was sent to his home, and on or about November 9, 1956 was seized with severe chest pain, was again hospitalized, almost died, suffered shock and severe congestive heart failure, and has been advised by his doctors that it is impossible for him to return to his former occupation.

11.

Plaintiff alleges that the said accident that occurred on or about October 19, 1956, above described was due to the negligence of defendant in that it permitted the main line on which its freight train was moving to be blocked by a truck or other vehicle of a customer of defendant, despite the fact that this blocking of the main line was at or near the end of a curve which to the knowledge of defendant and its agents, servants and employees, would make it difficult for defendant's engineer operating a train such as the one on which the plaintiff was riding to see that the truck or other vehicle was across the main line until near to it; that the said defendant permitted this truck or other vehicle to be left standing on the main line which was not a street or crossing, which was negligence; that defendant's engineer on the train was negligent in failing sooner to see the truck or other vehicle, in traveling at the speed he was operating at that point, and in the manner in which he suddenly and abruptly stopped the train in such a way as to cause plaintiff to be thrown forward and sustain injuries; that said defendant was further negligent with respect to the said accident of October 19, 1956 in failing to furnish plaintiff a safe place to work, and in failing to have advised its engineer, prior to the time he saw that the truck or other vehicle was across the main line blocking it, of the presence of the said truck or other vehicle, and said defendant and its agents, officers and employees were otherwise guilty of negligence in connection with said accident, not here detailed.

alleged that the right of way between Laurel and Main Streets has, to the knowledge of the railway company, been used for a number of years as a public thoroughfare and, on numerous occasions, both freight and passenger trains have been required to stop to permit removal of vehicles left unattended on the main line.

In the alternative, defendant's answer sets forth that if the action of its employees did constitute negligence such negligence was the remote and not the proximate cause of the accident inasmuch as the engineer in charge of the train had the last clear chance to avoid the accident. In this connection, defendant charges the engineer was guilty of operating the train at a speed in excess of the maximum legal rate of eight miles per hour within the city limits and failure to maintain a proper lookout and observe the truck in time to bring the train to a normal stop. The answer also denies that the accident of October 16, 1956, was the cause of plaintiff's hernia and asserts the cause thereof to be the former accident which occurred near Alexandria, Louisiana, during the previous month. In the final alternative, defendant maintains there is no causal relationship between the hernioplasty performed October 27, 1956, and the myocardial infarction sustained by plaintiff November 9, 1956.

Although defendant vigorously denies the occurrence of the alleged accident on either October 16, 1956, or October 19, 1956, because a check of its records fails to disclose that it had a box car on its siding on either date, we believe the record as a whole establishes the occurrence of the accident as alleged by plaintiff. For reasons which will hereinafter be made manifest, it matters not whether the accident occurred October 16, 1956, or October 19, 1956, therefore, we shall con-

fine our discussion of this issue to consideration of the evidence establishing the occurrence of the accident on October 16, 1956.

Regarding the occurrence of the accident, Homer Lee Thornton testified he was the engineer in charge of train Number 42 consisting of approximately 120 freight cars being drawn by three diesel engines. He stated the train left New Orleans, Louisiana, on the morning of October 16, 1956, enroute to Alexandria, Louisiana, and arrived in Baton Rouge between the hours of Eight and Nine O'clock A. M. According to Thornton, at the time of the accident he was stationed at his proper post on the right or east side of the northbound engine which was traveling at an estimated speed of 8 miles per hour, the maximum legal rate within the city limits. As he approached defendant's warehouse situated to his left on the west side of the track and when he was only about 200 feet south thereof, he then for the first time observed a small light colored panel truck backed up to a box car standing on defendant's spur, a short distance north of the north line of Laurel Street, which truck was parked in such manner that it faced in an easterly direction with its front wheels extending over both rails of the main line completely fouling the track. Thornton immediately activated the maximum braking capacity of the train and brought the train to a stop approximately 20 feet south of the offending truck. According to Thornton, he descended from the engine and noted a negro driver in the cab of the truck attempting to move the truck but experiencing difficulty in so doing because the front wheels of the vehicle were in a shallow ditch along the east side of the railway right of way. After maneuvering the truck back and forth several times, the driver eventually succeeded in removing it from the track. Thornton remained at the scene approxi-

mately 10 minutes to reestablish the proper air pressure in the train's braking mechanism (it having been completely exhausted in making the emergency stop), and then continued on his way. He was certain the accident occurred on October 16, 1956, and although at one time he thought it might have occurred on the 19th, he recalled it was on the 19th that he made his report on the incident to the company and it was this fact which caused him to confuse the dates. His testimony shows that after the train had stopped plaintiff contacted him via radio and inquired as to the reason for the emergency stop and Thornton advised him that he had placed the train in emergency stop to avoid hitting a truck fouling the main line.

Joseph Norwood, an engine foreman for L & A, testified he was on train 42 at the time of the accident having boarded same on the City of Baton Rouge at a point several blocks south of the scene of the accident. Norwood was riding in the third engine and after the sudden stop, he alighted from the train, walked to the front of the train and observed the truck parked across the main line approximately 20 feet ahead of the engine. He noted a negro driver seated in the truck rocking the truck back and forth in an effort to drive it away. He testified he did not speak to the truck driver but noted that the truck was a light colored panel truck with the words "Capitol Supply Company"[1] painted on the side thereof facing the train. Norwood was positive the incident occurred October 16, 1956 and not on the 19th.[2]

George Johnson, a brakeman riding in the caboose with

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[1] Admitted an affiliate or subsidiary of Consolidated.

[2] He recalled the date because he had been summoned to work that day which would ordinarily have been his day off. He did not work on the 19th at all because the 19th was the opening of the squirrel hunting season which day he took off to go hunting.

plaintiff, testified that an emergency stop was made and he believed it to have occurred on October 16, 1956. He stated that on the occasion of the sudden stop plaintiff was violently thrown from his seat in the caboose and plaintiff thereupon immediately informed him that plaintiff had been hurt. Johnson did not see the truck but overheard the radio conversation between plaintiff and Thornton in which Thornton informed plaintiff the stop was made to avoid running into a truck.

We conclude the evidence preponderates in favor of the occurrence of the accident as alleged by plaintiff.

Defendant's contention that the negligence of its employee in fouling the main line of the railroad (if such act was in fact negligence) is not actionable because, under the circumstances peculiar to the case at bar, such negligence was not the proximate cause of the accident, appears to be well taken. In this regard, defendant's position is predicated on the theory that Thornton, the engineer, had the last clear chance to avert the accident and failed to do so, therefore, under the well established jurisprudence of this state, Thornton's negligence is considered the proximate cause of the accident and defendant's negligence the remote cause thereof, the negligence of Thornton relieving defendant of liability herein.

In the precedent setting case of Rottman v. Beverly, 183 La. 947, 165 So. 153, the Supreme Court of this state adopted the rule that when a person negligently places himself in a position of peril which is discovered by another in time to avoid injury to the former but fails to avail himself of the opportunity to do so, the negligence of the party failing to exercise the last clear chance to avert the injury is held to be the proximate cause of the injury and the negligence of the

injured party the remote cause thereof. The rule established in the Rottman case was extended in Jackson v. Cook, 189 La. 860, 181 So. 197, wherein the doctrine of last clear chance was held applicable to those cases in which the defendant did not actually discover the perilous plight of the injured party in time to avoid the injury but, by the exercise of reasonable care, should have done so.

In Jackson v. Cook, supra, we find the following:

"Up to the time the Court of Appeal decided the Rottman Case, 162 So. 73, the jurisprudence relating to the last clear chance doctrine was confusing. This court in several cases had said in general terms that, where the negligence of a plaintiff continued up to the moment of the accident, there could be no recovery. Such statements had been made without qualification, and what we held in the Rottman Case was that such statements were too broad, and we qualified the rule by holding that, when a defendant sees another in peril of which the other is not aware, then a second or subsequent duty arises and devolves upon the defendant, which duty is to use every possible available means to avert injury. We said (page 156):

" 'If the defendant fails to perform that duty, his negligence in that respect is regarded as the proximate and immediate cause of the injury and the negligence of the plaintiff in putting himself in a place of danger, the remote cause. In such cases the last clear chance doctrine applies even though plaintiff's negligence continues up to the accident.'

"The only difference between the Rottman Case and the case presently before us is this: In the Rottman Case Mrs. Rottman was guilty of gross negligence which con-

tinued up to the moment of the accident. Beverly, the driver of the automobile, actually saw her in her perilous position in time to avert the accident had he used proper precautions. In the present case the plaintiff was guilty of gross negligence which continued up to the moment of the accident. The driver of the car did not see, but could have seen, plaintiff in his peril if he had been looking ahead. The mere fact that the driver of the car in this case did not see plaintiff does not absolve the defendant from liability, because it was the duty of the driver to look, and, according to the findings of both courts, he was not looking. The Rottman Case is not authority for holding that, merely because the driver of the car in this case did not actually see the plaintiff, the defendant is not liable."

Innumerable subsequent decisions have reaffirmed the above principles, including the more recent cases of Cassar et ux v. Mansfield Lumber Co., Inc., et al, 215 La. 533, 41 So. (2d) 209 and Litton v. Samuel 98 So. (2d) 534.

In the recent Federal Court case of Texas & Pacific Ry. Co. v. Black, 203 F. 2d 574 (5th Circuit 1953), in holding railway company liable for damage to a tractor-trailer parked in such manner as to foul defendant's track in the City of New Orleans, the Federal Court held the law of Louisiana to be as follows:

"The district judge held that under the law of Louisiana, if the operator of a train sees, or in the exercise of reasonable care should see, a person in a position of peril from which the person can not extricate himself, at such time that by the exercise of reasonable care the train could be brought to a stop before striking the person, the operator of the train has the last clear chance to avoid the accident, and if he fails to exercise due care so to do

he is guilty of negligence, and the injured person may recover even though he be a trespasser and his own negligence continues to the moment of the injury. Rottman v. Beverly, 183 La. 947, 165 So. 153; Jackson v. Cook, 189 La. 860, 181 So. 195; Tillman v. Public Belt R.R. Comm., La. App. 42 So. 2d 888. This principle is not limited to personal injuries, but extends as well to property damage. See also Shaw v. Missouri Pac. Ry Co., D. C., 39 F. Supp. 652; Cheek v. Thompson, D. C., 28 F. Supp. 391; Neal v. Louisiana & Arkansas Ry., La. App., 17 So. 2d 374; Griffin v. Thompson, La. App., 11 So. 2d 114."

In the course of its ruling in the Black case, supra, the Federal Court in holding the negligence of the railway employee to be the proximate cause of an accident quite similar to the one involved in the case at bar, the Federal Court remarked:

"The district judge found that although plaintiff was negligent in parking the International truck so that it fouled the railroad track, the engineer of the train saw, or could have seen the tractor, and that it was fouling the track, at least 300 feet before the train reached the point of impact; **that the engineer's failure to immediately apply the emergency brakes, and keep them applied, was negligence on his part; and that such failure was the proximate cause of the accident.** The engineer testified that he could have stopped the train within 200 feet or less, if the emergency brakes had been immediately applied and not released." (Emphasis supplied.)

The record of this case contains undisputed evidence to the effect that since execution of the agreement of August 31, 1933, wherein L & A granted defendant express permission to use its right of way between Laurel and Florida Street as a private thoroughfare, trucks belonging to defendant, as well

as those of other shippers (including trucks belonging to L & A) have constantly used that portion of the L & A right of way between defendant's spur and the main line for parking in the process of loading and unloading freight cars spotted on defendant's siding. It further appears that in the process of loading and unloading cars, defendant, its shippers and customers normally followed the procedure of backing trucks up to the east side of the box car at right angles thereto fouling the main line. The testimony shows that at no time has the L & A ever complained to defendant about the practice which thus developed and existed over a period of many years. We believe it fair to state Thornton testified he had never before been compelled to stop for a truck but that he was fully aware trucks were frequently parked in the right of way adjacent to defendant's warehouse.

Learned counsel for plaintiff contends the doctrine of last clear chance is inapplicable to the case at bar because the evidence shows Thornton, the engineer, could not see the truck in time to avoid the accident because of the "S" curve in the track and the presence of the house and tree on the east side of the right of way.

Thornton testified that he did not see the truck until his engine reached a point approximately 200 feet south thereof; that it was impossible for him to have seen it sooner because of the curve and the aforesaid house and tree and that if he could have seen the truck while he was 450 feet distant therefrom, he could have made a normal stop without danger to either the train or its crew.

Plaintiff also called as a witness one Jimmie F. Mims, an engineer, who testified concerning visibility, stopping distance

and the technical aspects of "bigholing" a train. Mims, an employee of L & A for 17 years and graduate of a course in railroad engineering, testified Thornton could not see the truck until approximately 200 feet distant therefrom and that an emergency stop of a train of the length and load of No. 42, traveling at a speed of 8 miles per hour, could be made within a distance of 175 feet. In this respect his testimony appears eminently correct considering Thornton testified he first saw the truck while 200 feet away yet stopped the train 20 feet south thereof. Mims also stated that a train composed as No. 42 was composed on the date of the accident could make a normal uneventful stop in 300 feet.

In addition Mims gave a most enlightening explanation of the technical and mechanical aspects of the procedure involved in stopping a train from which discourse we understand that each component unit of the train possesses separate and independent braking facilities which operate on the wheels of each individual car or unit. The brakes are energized by air pressure furnished by means of lines or hoses with which each car is equipped, the hose of each car being joined to the line or hose of the unit fore and aft at the time the train is assembled so that the line in effect flows from the lead engine to the rearmost unit of the train. After the lines are thus connected and before the train embarks upon its journey the entire continuous line is then pumped up or pressurized to the required pressure. The engine contains certain controls designed to operate the braking system under different circumstances. One control is designed to reduce the speed of the train in transit or bring it to a gradual, slow stop. In utilizing this particular control only a portion or fraction of the air pressure in the system is used and its replenishment may be effected while the train is in motion. Another control is

designed especially for emergency use and its application involves immediate utilization of the entire pressure in the system. Once the train is placed in emergency or "bigholed" it must come to a stop and cannot resume its progress until the line is again pumped or pressurized. When the "bigholing" process is initiated the braking process takes effect on the engine wheels in about 7 seconds following application and is thereafter transmitted through the connected air hoses car by car to each successive unit of the train. When the emergency brakes become operative the engine "set down" or stops whereupon the slack in the coupling mechanism of the car immediately behind the engine is taken up and the second car stops by literally ramming into the preceding engine. As each unit of the train is thus brought to a halt in an emergency stop, the force of the impact against the preceding unit increases in progression toward the rear of the train consequently the impact of the last car against the car immediately ahead is greatest of all.

In contending that the doctrine of last clear chance is not applicable because it was impossible for the engineer to see the truck until he was so close he could not have avoided striking the truck except by making an emergency stop, learned counsel for plaintiff relies upon the testimony of Thornton and Mims and certain aerial photographs introduced in evidence. In this connection there is also of record a map of the area made by Rhea D. Percy, Civil Engineer, reproducing the exact degree of the curve in question and showing the south curb line of Florida Street (the next street south of Laurel Street) to be 482 feet south of the point where defendant's truck was parked, said distance being measured along the L & A track. Despite the testimony of Thornton and Mims to the contrary, certain pictures introduced in evidence by

plaintiff, namely D-3, D-4 and D-7 clearly show that the truck could have been seen by a person standing on the track at least 540 feet south of the truck. More particularly D-3 taken from a point approximately 540 feet south of the spot where the truck was parked, clearly reveals the presence of a light colored station wagon parked on the track at the approximate point where the truck was situated on the date of the accident. In this regard, counsel for plaintiff vigorously argues the view of the engineer in the cab of the engine is vastly different from that of a person standing on the track and that. from the engine, the engineer did not have unimpeded vision because of the curve and the obstructing house and tree previously mentioned. Defendant introduced in evidence photograph D-7 taken from the cab of an engine and which shows that the view of the engineer from that vantage point was even better than that of an individual standing on the track. Although the evidence does not show the exact distance from which photograph D-7 was taken, from landmarks clearly visible and identifiable, it appears to have been taken from a point in the vicinity of Florida Street approximately 450 feet south of defendant's warehouse. We are convinced the photographs show the truck could have been seen at a distance of 450 feet or greater. On this issue counsel for plaintiff contends the aerial photographs showing the general area and more particularly the curve in the track indicate the engineer could not have possibly seen the truck sooner than he did. We have hereinabove analyzed in detail the visibility of the engineer from the engine cab and found that he could have seen the truck in time had he been keeping a proper lookout. The view of the accident scene from the air is of little probative value. Unfortunately for plaintiff, the cause of his injury was a train and not an aircraft.

We are inclined to attach more weight to the testimony of Mims than that of Thornton regarding the distance in which a normal stop could have been made under the circumstances for the testimony of the former clearly shows he is far better versed in the technical aspects of railroading than the latter. Assuming, arguendo, Thornton was correct in stating the normal stopping distance to be 450 feet as opposed to 300 feet testified to by Mims, we are convinced from the evidence that Thornton could have seen the truck while at least 450 feet distant had he been maintaining a vigilant lookout.

We do not hold that the agreement of August 31, 1933, conferred upon defendant the right to foul the track at will, nor is it necessary for us to so hold for purposes of this decision. We do say, however, that in conformity with the recognized weight of authority such written authority expressly granting defendant use of the right of way, clearly removed defendant from the category of a trespasser and characterized defendant's use of the area as that of licensee or invitee. In such circumstances, the railway granting such use, and its employees are held to a greater degree of care and vigilance than is owed to a mere trespasser. The following pronouncements on the subject matter appearing in Volume 75 C.J.S. Verbo Railroads, Page 287, Section 904, and Page 289 Section 905, are believed pertinent:

> "The amount of care required of a railroad is commensurate with the reasonably apprehended danger or probability that persons might be on the track or on the premises at a particular point. Where within the knowledge of the company persons, including licensees or trespassers, have been accustomed to be on the tracks at a certain place, as where the public has habitually passed across or along the tracks or the right of way at a cer-

tain place for a long time with the company's knowledge or consent, such as in a city or thickly settled community where persons are likely to be found trespassing, it is the duty of the railroad to use reasonable or ordinary care and diligence to discover and avoid injury to such persons, since it has reason to anticipate the presence of persons on the tracks at such point, and it has no right to presume that the track is clear. It has been held that this doctrine is confined to cities or thickly populated communities, and that it does not apply in rural or sparsely settled communities although people in the neighborhood frequently pass across or along the right of way, nor does it apply with respect to a person on a track in the railroad's private yards. Liability may be imposed even though the particular employees in charge of the engine or cars which caused the injury to the person on the track were ignorant of such custom or were unaware of his presence on the track. Where the company is operating a train on a city street used in common by it and pedestrians and vehicles, it must take precautions against collisions which are not necessary when it is operating trains on its own right of way, but where the street is away from the traveling public the railroad is not held to the same strict accountability as in the case of the streets of a thickly populated community.

"As a general rule, except where the presence of a licensee on or near the tracks is known or may reasonably be expected, the railroad company owes no affirmative duty of care or active vigilance to him. The railroad company must use reasonable or ordinary care to avoid injuring a person who is on the right of way by its express or implied consent or invitation.

"The rights of mere or bare licensees are entirely different from the rights of persons who are upon premises of a railroad company by invitation, express or implied, for a purpose connected with its business. As a

general rule, except where the presence of a licensee on or near the tracks is known or may reasonably be expected, the railroad owes no affirmative duty of care or active vigilance to him, and the extent of its duty is not wantonly or willfully to injure him, or to exercise ordinary care when it becomes cognizant of his peril.

"Where a person is on the right of way by the express or implied consent or invitation of the railroad company, it must use reasonable or ordinary care to avoid injuring him. It owes a greater duty to persons of such class than to mere trespassers or bare licensees. The mere act of permitting the customary use which changes the user's status to that of licensee does not of itself constitute negligence on the part of the company."

Applying the foregoing principles to the facts of the case at bar, the engineer was under an even greater duty and obligation of caution than is incumbent upon him under ordinary circumstances. Not only did defendant have the contractual right to use the right of way, but also it had in fact done so for a period of approximately 26 years to the knowledge of the railway company and its employees, including the engineer, Thornton. Under the circumstances of this case, Thornton had every reason to anticipate the presence of vehicles on the right of way adjacent to defendant's premises. Assuming the house and tree constituted an impediment of vision as Thornton testified, such circumstances should have prompted him to utilize a higher degree of caution. He was traveling through a congested commercial district of a large city under circumstances which cried out for caution in the highest degree. His failure to exercise such vigilance and care was the proximate cause of the accident.

We are reminded by counsel for plaintiff of that line of jurisprudence holding that the finding of the jury on a question of fact is to be given great weight by the appellate courts and should not be disturbed unless manifestly erroneous. We are thoroughly and completely in accord with the principle enunciated and, although we are hesitant to reverse a jury or trial court on a finding of fact, it is our duty to do so when the conclusion of the trier of fact (whether judge or jury) is clearly contrary to the law and the evidence. Decision on this question must turn, in each individual case, upon the facts and circumstances involved. Citation of authority in support of the foregoing principle is deemed unnecessary since it is elementary that circumstances vary in each case presented. The principle must be applied after consideration of all of the evidence adduced in the particular case under consideration.

The learned trial court properly charged the jury that to find defendant liable herein it must find defendant guilty of negligence constituting a proximate cause of the accident. The verdict in favor of plaintiff necessarily implies the jury did, in fact, find defendant guilty of such negligence and in so doing, the jury committed manifest error.

The views herein expressed obviate the necessity of our passing upon the remaining contentions advanced by defendant.

Accordingly, judgment is rendered herein reversing the judgment of the lower court in favor of plaintiff and dismissing plaintiff's demand. All costs in the lower court and of this appeal to be paid by plaintiff appellee, Luther Spiers.

Reversed.

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

LUTHER SPIERS	:	Appeal from the Nineteenth
Plaintiff-Appellee	:	Judicial District Court, Par-
vs.	:	ish of East Baton Rouge;
CONSOLIDATED COMPANIES,	:	Hon. Jess Johnson, District
INC., *et al.*	:	Judge, Presiding.
Defendants-Appellants		

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Before ELLIS, LOTTINGER, TATE, FRUGE, and LANDRY, Judges.

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TATE, Judge (dissenting).

With much respect for the excellently and conscientiously written majority opinion, I must nevertheless respectfully dissent from this reversal of the trial court judgment which had held that the negligence of the defendants' truckdriver contributed to the present accident. (For the question before us is not whether the accident was caused **either** by the negligence of the railroad of the engineer **or** by the negligence of the truckdriver: it is rather whether the latter's negligence was a **contributory** cause of the accident.)

Factually, I would agree that, **if** the photographs D-3 to D-7 actually reflect the scene visible to the naked eye of the engineer as he approached the parked truck on the date of the accident in October of 1956, then indeed his own negligence in failing to perceive sooner the truck was the sole proximate cause of the accident. But what concerns me, and I think it raises a serious legal question as to the sufficiency of these

photographs as proof of such, is that there is not one line of testimony to indicate that these photographs taken in April of 1958, one and one half years after the accident, correctly showed the view of the truck and the Consolidated warehouse visible to a railroad engineer approaching the site from the south **on the date of the accident.**

To the contrary, there is positive, sworn, and uncontradicted testimony by the only two engineers testifying that the truck-site at the side of the Consolidated warehouse was not visible to oncoming locomotives until they were within 200 feet of it, because of a shotgun house and an elm tree, in conjunction the shape of the "S-curve." There is positive, uncontradicted, and sworn testimony by the Baton Rouge railroad terminal master and by one of the engineers that the shotgun house and the tree in question were removed after the accident and by the end of 1957, which was **before** the photographs were taken. (Tr. 255, 285.)[1] Moreover, the uncontradicted evidence by engineer Thornton is that photograph D-3 did **not** reflect what could be seen as the warehouse was approached from the south. (Tr. 109.)

Further, the trainmaster testified that due to frequent complaints by the engineers that the limbs of the tree interfered with visibility, it was necessary to have these limbs cut "every so often," "every four or five months." (Tr. 254-255.) Thus, even conceding that a tree seen in the photographs is

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[1] The other engineer testified that the tree and house was removed, but he did not place a date as to said removal. Tr. 58. Although he identified a tree on an aerial photograph taken in March, 1958 (D-2) as the elm tree in question, he also stated that the tree did not look like the one that blocked the view. Tr. 65-68. It is noteworthy also that he was not asked to identify the tree on the ground level view photographs showing the approach from the south.

actually the one about which the engineers complained, there is no evidence to show whether the pictures in April 1958 represented it as recently trimmed, as compared with an untrimmed and view-obstructing condition at the date of the accident.

The able counsel for the defendants did not see fit to introduce any evidence to contradict such testimony. The photographs were introduced[2] by asking engineer Thornton, a witness for plaintiff, whether the photographs were of "the KCS track as it crosses Florida Street" (Tr. 69), which they obviously were by reason of the well-marked office buildings and other landmarks. There was not the slightest effort to obtain from Thornton or any other witness any testimony that these photographs resembled the scene on the date of the accident.

It seems to me extremely doubtful, as a matter of law, that these unsworn and unauthenticated photographs should be given such weight as to override uncontradicted sworn testimony which specifically stated that on the date of the accident 1½ years earlier the visibility of oncoming locomotives was obstructed by a house and a tree which are no longer there and which were not there when the pictures were taken. As a trier of fact, I would have regarded the photographs with skepticism, because of the circumstances of their introduction and of the lack of proof that they reflected the scene as of the date of the accident; as an appellate reviewer, I am inclined to believe it is not within our function

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[2] So far as my notes reflect, the sole evidence in this voluminous record concerning them is found: for photographs D-3 to D-6 at Tr. 69-72 and 108-112; for photographs D-1 and D-2 from Tr. 64-69; and photograph D-7 was introduced and discussed at Tr. 111-112.

to substitute conclusions drawn by us from such unauthenticated photographs for the sworn testimony of witnesses accepted by the trier of fact.

Aside from the circumstance that a locomotive engineer approaching a heavily travelled thoroughfare in a heavily populated area might not reasonably be held to observe details perceivable in a still photograph available for inspection in the quiet of a law library, one last comment may not be inappropriate relevant to the reliability of these photographs as evidencing what might be seen by the naked eye of an engineer. Photograph D-3 was taken to show the scene from 60′ south of Florida Street, or 540′ south of where the truck was parked; in this photograph, the light station wagon is clearly visible, as are the details of the adjacent warehouse. But in photograph D-6, showing the scene from 100′ south of Florida —or just 40 feet further south than the spot from which D-3 was taken—the same light vehicle and the details of the warehouse are obscure and barely visible, and some shrubbery west of the track seriously interferes with visibility of the distant scene of the warehouse and truck. It is hard to believe that the 40 feet of distance made the great difference shown by the two pictures in the visibility of objects some 500′ distant —without enlightening expert testimony or a more formal authentication of the pictures, for instance, one wonders whether or not the type of lens used was the same.[3]

For these reasons I must respectfully disagree with the views of my esteemed brethren of the majority.

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[3] It is of course unnecessary to add that no reflection is intended on the efforts of eminently honorable counsel, who did not introduce or vouch for the photographs as showing other than "the KCS tracks as it crosses Florida Street." (Tr. 69.)

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

LUTHER SPIERS	:	Appeal from the Nineteenth
Plaintiff-Appellee	:	Judicial District Court, Par-
vs.	:	ish of East Baton Rouge;
CONSOLIDATED COMPANIES,	:	Hon. Jess Johnson, District
INC., *et al.*	:	Judge, Presiding.
Defendants-Appellants		

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Before ELLIS, LOTTINGER, TATE, FRUGE, and LANDRY, Judges.

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Addendum to dissent

TATE, Judge.

A rehearing was granted primarily to allow consideration of the contention that, as against an innocent party injured through the concurrent negligence of two defendants, neither tortfeasor can exculpate himself from liability by alleging that the accident was produced by the greater or more proximately intervening negligence of the other. Shield v. F. Johnson Co., 132 La. 773, 61 So. 787; Abrego v. Tri-State Transit Co., La. App. 1 Cir., 22 So.2d 681. It was also granted to consider various substantial alternative contentions raised by the defendants-appellants.

Prior to the consultation at which this rehearing was granted, the writer reached the conclusion that his original dissent had erroneously agreed that the defendants-appellees should be held free of liability if the railroad engineer had the last clear chance to avoid the accident. Because I may not be sitting with this court when the case is heard upon rehearing, I wish to revise my dissent to the original opinion in this regard. For after all, from a common sense standpoint, the primary cause of the accident was the negligence of the defendants' truck driver in blocking a main railroad line by their premises, even though the negligence of the railroad engineer in failing to perceive the danger sooner may have contributed to the accident and the resultant injuries received by the plaintiff.

Further, since the writer may not be with this court upon the rehearing, it does not seem to him to be inappropriate to elaborate somewhat the views of the original dissent.

Reverting to the original dissenting opinion, my able brethren of the majority were led into (in my belief) erroneous reliance upon the photographs by the feeling that any discrepancies between them and the actual scene at the date of the accident should have been developed by direct or cross examination by counsel for the plaintiff-appellee. Such, perhaps, is a contention that should better have been addressed to the argument before the jury, which had the duty of weighing, against these pictures, the sworn testimony that a tree and house since removed had at the date of accident obstructed the view of northbound engineers.

It was this sworn testimony upon which the plaintiff-appellee relied; and had the trier of fact discounted it in

favor of the photographs, it would not now be open to appellee to argue that the photographs did not really resemble the scene at the date of the accident, when counsel had failed at the trial to develop this discrepancy. But, similarly, the appellant did not see fit to introduce evidence to prove that the scene at the time of the accident was correctly reflected by the photographs, which it was stipulated were taken one and one-half years after the accident and which the engineer-witnesses without contradiction testified did **not** reflect the view of an oncoming engineer at the time of the accident. Having introduced the pictures without such proof—having accepted their chances at the trial of introducing them in the face of the sworn contradicting evidence—, the appellants cannot (it seems to me) **now** argue on appeal that the photographs do really reflect the view at the time of the trial.

The truth of the matter is that whether the photographs do or do not correctly reflect the scene at the time of the accident (and outweigh sworn evidence that they do **not**) is a matter that cannot be determined by mere examination of the record before us on this appeal. It is a factual determination that, on the basis of the present record, an appellate court is not qualified to make. To hold that the pictures do truly represent the scene at the time of the accident we must rely on naked inference. To do so in the face of a contrary resolution by the trier of fact (and where, incidentally, we are informed that the trial jury actually visited the scene) seems to me to be simply beyond our function of appellate review.

APPENDIX "D"

COURT OF APPEAL, FIRST CIRCUIT
STATE OF LOUISIANA

LUTHER SPIERS,

Plaintiff-Appellee,

versus

CONSOLIDATED COMPANIES, INC., ET AL.,

Defendants-Appellants.

Appeal from the Nineteenth Judicial District Court, Parish of East Baton Rouge; Hon. Jess Johnson, District Judge, Presiding.

Before ELLIS, LOTTINGER, TATE, HERGET, and LANDRY, Judges.

ON REHEARING

TATE, Judge.

Following rendition of our original opinion applications for rehearing were filed by both the plaintiff-appellee and defendants-appellants. All parties' applications were granted

to allow consideration of the various contentions advanced. Since our original opinion fully stated the facts and issues, we will, insofar as possible, avoid repetition thereof.

After thorough reconsideration of the entire record, we have come to the conclusion that our original opinion correctly held that the plaintiff had borne his burden of proving the accident of October 16, 1956, from which his injury allegedly resulted, but that we were in error in holding that Consolidated and its insurer were absolved from liability because the L. & A. railroad engineer had the last clear chance to avoid the accident.

Called to our attention by the plaintiff's application for rehearing was controlling jurisprudence, previously not cited, to the effect that the doctrine of last clear chance can not be invoked by joint tortfeasors against one another, which we now expressly recognize and follow. Shield v. F. Johnson & Son Co., 132 La. 773, 61 So. 787; Abrego v. Tri-State Transit Co., La. App. 1 Cir., 22 So. 2d 681. As these cases held, it is well settled that where the negligence of two or more persons combines to cause an injury to a third person, all of the persons whose concurrent negligence contributed to the injury are liable in solido, and the injured third person, if without fault, has a right to collect his full damage from any or all of the defendants. See also Fontenot vs. National Transfer Co., La. App. 1 Cir., 93 So. 2d 254. No fault by plaintiff contributing to the evidence and barring his recovery is shown by the record, nor can any negligence of his co-employee, the railroad engineer, be imputed to the plaintiff in this suit by him against a third party. (See, e.g., Alford v. Louisiana & Ark. Ry. Co., La. App. 2 Cir., 38 So. 2d 258.)

Plaintiff is thus entitled to recover the damages sustained by him as a result of the accident of October 16, 1956, if negligence on the part of Consolidated was a proximate cause thereof. We thus do not find it necessary to discuss further any negligence on the part of the railroad engineer, for we will assume most favorably to the defendant that the negligence on his part contributed to the accident.[1]

I. Negligence of Consolidated's Truckdriver as a Proximate Cause of the Accident.

The intentional obstruction by a truck of a main travelled railroad line in the heart of a heavily populated city is negligent and will foreseeably endanger the life and property of others, since it is reasonably foreseeable that the obstructing vehicle will hamper the inherently dangerous operation of heavy and hard-to-stop railway trains, foreseeably causing the danger of collision or (as here) the dangerous maneuver of a sudden train stop to avoid a collision. See, for instance, Bergeron v. Greyhound Corporation, La. App. 1 Cir., 100 So. 2d 923, wherein it was held that conduct foreseeably increasing the hazard to public highway traffic and avoidable by the exercise of ordinary care creates an unreasonable risk or harm to others so as to constitute negligence. See also LSA-R.S. 14:97, providing criminal penalties for "• • • the intentional or criminally negligent placing of anything or performance of any act on any railway, railroad, navigable water-

[1] The writer of this opinion still retains the view that a jury finding that the engineer could not reasonably observe the defendant sooner is not manifestly erroneous based upon uncontradicted sworn testimony in the record, contradicted only by what the writer feels to have been photographs insufficiently authenticated as reflecting the scene at the time of the accident a year and a half earlier. It is unnecessary however to discuss this view, with which all of the members of the majority do not necessarily agree, in view of our holding that Consolidated's negligence contributed to the accident.

way, road, highway, thoroughfare, or runway of an airport, which will render movement thereon more difficult." The dangerous situation created by the negligent conduct of the defendant's truckdriver by blocking a main railroad line substantially contributed to the accident and was thus at least a concurrent proximate cause thereof.

To whatever extent a few seconds lack of observation or look-out by the railroad engineer might also have contributed to the accident, from a common sense point of view it is obvious that the primary reason for the accident was the inherently dangerous act of defendants' employee in blocking a main railroad line. Further, as Justice McCaleb succinctly observed in Jackson vs. Jones, 224 La. 403, 69 So. 2d 729, 733, holding a contractor liable for creating a danger which through the intervening act of another tortfeasor caused injury to the plaintiff:

> "The determination of the proximate or efficient cause of an accident, as distinguished from the remote cause, is sometimes difficult of practical application and often turns 'upon the very nicest discriminations'. The Louisiana Mut. Ins. Co. v. Tweed, 7 Wall, U.S., 44, 19 L. Ed. 65. However, in matters like this, the criterion governing liability is whether the person creating the danger could or should reasonably have foreseen that the accident might occur. If such were the case, then he is liable notwithstanding the intervening cause. Sec. 38 Am. Jur. Verbum 'Negligence' Sec. 70, pages 726, 727."

See also Comment, "Proximate Cause In Louisiana," Vol. XVI Louisiana Law Review 391 (1956), 399-400:

"The presence of causes intervening subsequent to defendant's act which brings about injury presents no special problem. In such cases, the inquiry of the court is simply whether the risk produced by the combination of defendant's act and the intervening cause is one which is within the scope of protection of the rule of law upon which plaintiff relies. * * * In cases of this kind, the courts ordinarily use the 'foreseeability' formula previously mentioned, and indicate that 'foreseeable intervening forces do not supersede defendant's negligence.' "

In urging that Consolidated's employee was not negligent in parking his truck across the main railroad track and in not removing his truck sooner upon the approach of a train, the defendants place great reliance upon an agreement of August 31, 1933, between Consolidated and the L&A pertaining to use of a spur track constructed between Consolidated's warehouse and the main line of the railroad, especially paragraph 13 thereof, which is quoted at Footnote Number 1 of the original opinion of this court.

As we held in our original opinion, such agreement and the customary presence of trucks near the railroad track may well be one of the circumstances to be taken into consideration in a conflict between the railroad and Consolidated as to which party had the last clear chance to avoid an accident resulting from the presence of Consolidated's trucks on the track; but when a third party is injured through the action of Consolidated's employee in creating a foreseeable risk to others by blocking the main railroad line, such agreement between Consolidated and the railroad cannot have the effect of lessening either's duty to other members of the public.

Actually, although two of Consolidated's employees did testify that trains on the main line had been compelled to stop on many occasions over the years by trucks parked at the Consolidated warehouse (Tr. 431, 433, 440, 451, 452), the testimony of the railroad employees indicated that although trucks were frequently parked so as to protrude across the main line, these trucks had moved out upon the advance of the train so as to occasion only on several occasions the need for an emergency stop (Tr. 16, 41, 98-99, 250, 254, 282-283). Also, by reference to the above-quoted agreement, Consolidated was granted the right to use the space between the main line and the spur and not to block the main line, and Consolidated was required by the agreement to "at all times have a driver in charge of any vehicle using this driveway alongside of the tracks, so as to immediately move said vehicle on the approach of trains or as otherwise necessary."

The circumstance that Consolidated's negligence in blocking the main line on previous occasions had not resulted in injury to others cannot serve to excuse such negligence when the repetition of the negligent conduct ultimately did result in injury. "Custom and usage may be regarded as a matter proper for consideration in determining whether or not sufficient care has been exercised in a particular case, but it is not conclusive or controlling, for the customary way of doing a thing may be a negligent way and may create a false standard of care, and, once negligence is established, such negligence cannot be justified by custom," Harris Drilling Co. v. Delafield, 222 La. 416, 62 So. 2d 627, 629-630.

Having found that Consolidated's negligence contributed to the accident, the defendants are liable for the harmful consequences (if any) thereof sustained by the plaintiff, includ-

ing (if proved to have been a consequence thereof) the disabling heart condition of which the plaintiff complains. See Bergeron v. Houston-American Insurance Company, La. App. 1 Cir., 98 So. 2d 723, certiorari denied; Lynch v. Fisher, La. App. 2 Cir., 41 So. 2d 692.

II. Injuries Resulting from Accident.

As an immediate result of the above accident of October 16, 1956, plaintiff claims to have sustained a hernia; and, as a consequence of surgery to repair the hernia, he contends that he sustained a myocardial infarct (heart attack) which permanently disabled him. The defendant denies that the hernia resulted from the accident in question, and further denies that the plaintiff has proved any causal relationship between the surgical operation and the subsequent heart attack.

The evidence without contradiction reflects that the plaintiff was found at least by October 22 to have sustained a hernia, which was surgically repaired on October 27th. Also there is no dispute that plaintiff is now permanently and totally disabled by reason of a heart condition which without contradiction manifested itself at least by November 9th, although the plaintiff contends that such heart condition results from an attack which manifested itself on October 27th as a consequence of the surgery.

The defendants contend that the hernia and its aftereffects did not result from the accident of October 16th, primarily relying upon a claim form executed by a doctor's employee on October 22, 1956, allegedly based on a history supplied to him by the plaintiff, which states that the accident causing the hernia had taken place in September when the plaintiff was working near Alexandria on another train.

The defendants also seem to rely upon alternative allegations concerning such earlier accident urged alternatively in another suit by the plaintiff against his employer, the L & A railroad, which alternative allegations the plaintiff's counsel argues were included by him in the petition in the other suit simply as a precaution in view of the clerical error in the doctor's claim form of October 22nd.

The plaintiff testified positively that at the time of the accident he felt a stinging pain in his groin and was hurt. The railroad employee on duty with him in the caboose corroborated that immediately following the accident the plaintiff complained that he was hurting and that on account of such complaints the plaintiff remained in his seat at the stop rather than walking up to the front of the train. The plaintiff further testified that the hurting in his groin persisted and that the next morning he noticed a small swelling and blueing at the site of the pain, but that he did not go to a doctor at first because very often accidental hurts cure themselves.

However, in Alexandria several days later he became nauseated and then reported to the company's doctor at Alexandria, who found that the plaintiff was herniated. The plaintiff stated that he had also told the doctor's employee who typed the claim form about a minor leg injury he had sustained in September while trying to catch the caboose (which injury had not required medical treatment), in addition to informing him of the October accident; but that, in completing this minor clerical form, the doctor's employee had apparently through misunderstanding noted the incorrect information. The plaintiff's account is corroborated to some extent by the circumstance, brought out by the defendants'

cross-examination, that he had reported only the October accident as the cause of his hernia in his official "lost time" report completed on October 23rd (the next day) to his employer. (Tr. 377), as well as by the uncontradicted accident that it was only after the second or October accident that the plaintiff commenced complaining of pain in his groin, from which he suffered almost continuously up through the medical examination six days later when the hernia was discovered.

Ultimately, whether plaintiff's credibility and those of the supporting witnesses to his apparently credible version that the hernia resulted from the October accident should be regarded as lessened by such mistaken claim form depends upon whether the plaintiff's explanation of the mistaken claim form is accepted as reasonable under all the circumstances. We do not find manifest error in the jury having accepted the plaintiff's version of the incident and the surrounding circumstances as against the testimony of the claim employee who under the plaintiff's version through a misunderstanding took down the wrong information in completing the form. "The determination of which set of opposing witnesses is testifying truly is primarily for the trier of fact, and the factual determinations of the trial court should not be disturbed upon review except in the case of manifest error. This principle of appellate review applies also to trials by jury, and it is further to be noted that the jury verdict herein was approved by the trial judge in his denial of the plaintiff's motion for a new trial, (citations omitted)," Thomas vs. Mobley, La. App. 1 Cir., 118 So. 2d 476, 481.

Plaintiff's most substantial claim for damages, however, arises not from the hernia, which we find to have resulted from the accident of October 16th, but from a serious and

permanently disabling heart condition which is alleged to have been precipitated by the surgery to repair the hernia and its after-effects.

The herniaplasty operation was performed under general anaesthesia and without incident on October 27, 1956. However, that evening the plaintiff experienced nausea, vomiting and retching, together with a slight elevation in temperature and some pulse change.

Plaintiff's attending physician, Dr. Chester Williams, a general surgeon and admittedly not a cardiologist, felt that the plaintiff might be experiencing a myocardial infarction and therefore called Dr. Roger Reynolds, a cardiologist, into consultation that same evening. Dr. Reynolds examined the plaintiff and ordered an electrocardiogram taken a study of which and of a cardiogram taken forty-eig[illegible]s after the first, failed to confirm a diagnosis of infarctio[illegible]

Based upon the opinion of Dr. Reynolds that the plaintiff had not experienced an infarction, Dr. Williams permitted the plaintiff to become ambulatory a day or two thereafter. The plaintiff was permitted to return home on November 1st. However, at ten in the evening on November 9th, eight days later, the plaintiff did experience a near-fatal infarction, confirmed by electrocardiogram. He is admittedly permanently disabled and has been under Dr. Reynolds' care and treatment since that time.

The defendants essentially contend that the disabling heart condition resulted from an attack on November 9th, eight days after the plaintiff's discharge from hospitalization, independently of any cause through the surgery and its after-

effects. The plaintiff contends, relying on Dr. Williams' positive testimony to such effect, that the plaintiff's disabling heart condition resulted from the strains and complications of surgery and its after-effects and was first instanced by the attack of November 1st.

The defendant relies on the testimony of Dr. Reynolds that the initial seizure was not a heart attack, and also of two other specialists who had never treated the plaintiff but who from his hospital records and history opined that plaintiff had not sustained an infarction immediately following the accident.

In our opinion there is no error in the obvious finding of the jury that plaintiff's present serious and permanent disability resulted from a myocardial infarction caused as an aftermath of the surgery and while plaintiff was still hospitalized on November 1st, substantiated as we believe it to be by the following substantial evidence:

During the night following the surgery of October 27, 1956, he began having a severe chest pain, which his attending physician, Dr. Chester Williams, believed was a heart attack (coronary thrombosis), so that he immediately called in Dr. Roger Reynolds, an internist, for consultation. Dr. Reynolds found no significant changes on the two cardiograms taken within 48 hours of the seizure so that Mr. Spiers was permitted to go home on November 1, 1956. Dr. Williams did, however, note that the plaintiff had sustained a possible myocardial infarction without electrocardiographic confirmation, which confirmation the evidence reveals usually but does not necessarily obtain in the case of heart attacks.

On November 9, 1956, Mr. Spiers sustained what was admitted to be a heart seizure, and nearly died, which subsequent electrocardiograms revealed to be a myocardial infarction on the posterior surface of the heart. Mr. Spiers remained under Dr. Reynolds' care subsequently. The symptoms and actions of plaintiff during the first and second attacks were practically identical, except that the second was much more severe.

In view of this sequence, Dr. Chester Williams was absolutely positive that his patient, the plaintiff, had suffered a heart attack at the time of the first severe chest pain; that Dr. Reynolds was mistaken in his diagnosis that none had occurred; and that both doctors had been in error in releasing Mr. Spiers from the hospital following the first attack. This very positive opinion of the attending physician, confirmed as it is by the circumstances that Spiers had indeed suffered severe chest pains which caused the attending physician to believe a heart attack was in process at the time, is in our opinion entitled to such weight as would entitle the jury to accept to find, in the light of the surrounding circumstances and the admissions in the other medical testimony, that the heart condition resulted from the first seizure of October 27th and was thus causally related and a direct consequence of the hernia resulting from the defendants' truckdriver's negligence.

Defendants rely greatly upon the testimony of Dr. Reynolds, the internist, whose clearance had permitted Mr. Spiers to leave the hospital about six days after the first seizure, who was of the ultimate opinion in his original diagnosis that no heart attack had occurred.

It was not manifestly wrong for the trial jurors to discount to some extent this opinion, because jurors as well as

ourselves are familiar with the conscientious specialist who sincerely (or sometimes stubbornly) does not wish to admit a mistake, especially a mistake that nearly caused a man to die, and because Dr. Reynolds, in his apparently straight forward and honest testimony admitted that it was possible that the vomiting and other straining following surgery could have provoked a heart attack during the first time in the hospital, as a result of which Dr. Reynolds frankly admitted "I do not know whether he had a heart attack immediately after the operation or not." This specialist further admitted that three circumstances seem to support a heart attack at the time of the initial severe chest pain; (1) The severe chest pain of the second seizure occurred in the same area and in the same pattern as it had the first time; (2) following the second seizure when Spiers was hospitalized, his blood sedimentation test was greatly elevated, whereas after heart attacks it usually takes two days for such tests to be elevated, which would seem to indicate that there had been a heart attack earlier than on the night of the second seizure; and (3) the electrocardiogram taken on the second hospitalization showed definite evidence of a heart attack on the back surface of the heart, whereas usually the electrocardiogram goes through certain characteristic changes in the first few days which it did not go through following the second attack, so that the plaintiff's cardiogram "did not show these first early changes, characteristic changes, but were more suggestive of something that happened previously." (Tr. 190-194 for all this testimony).

As an illustration that this apparently conscientious physician was no longer certain that the seizure in the hospital on October 27th as a result of the complications following surgery was not, in the light of aftersight, the precipitating

and disabling heart attack, we quote Dr. Reynold's testimony at Tr. 199 et seq.

"A. The 27th. **In retrospect I believe that the pain that he was having the day I saw him immediately after the operation was coming from his heart, yes, sir.** (Emphasis added)

"Q. And that would be strictly—how would you describe that in medial terminology, the heart condition?

"A. I think that anyone who has a heart attack must have some underlying disease of the coronary arteries. In view of what happened in the next couple of weeks and in view of the factors I recited in previous testimony I believe that the pain he was having that day was coming from his heart and I believe it was coming because the heart was getting insufficient blood for the requirements, for the work that it was having to do. The medical term that you would apply under those circumstances depends upon a number of factors. The word 'angina' refers to a temporary condition in the heart where the—it is temporary insofar as the pain is concerned and temporary insofar as the severe insufficient supply of blood to the heart muscle is concerned. For instance, people with angina will have pain a few minutes and with rest it may disappear. On the other extreme is a myocardial infarction and that is a state where the blood supply is so poor or so lacking that the heart muscle actually dies, it goes away. Now, in between these two extremes you see people whose pain lasts quite some time, whose electrocardiograms may show some changes which may be temporary in nature, and the term that has been proposed for that is coronary insufficiency. That would be a mid-way term between

angina on one hand and a real heart attack on the other hand.

"Q. Now, would you say this myocardial infarction that Mr. Spiers ultimately suffered was highly probable or perhaps inevitable at some time in view of his basic underlying condition?

"A. I think if he had not have had something else first he would have eventually had a heart attack, yes, sir.

"Q. And I gathered from what you said the first time you were able to say with supporting evidence this heart muscle had died was with the EKGs that you took perhaps on the 9th or 10th of November.

"A. Yes, sir, on the second admission, yes, sir.

"Q. Now, could you say whether Mr. Spiers' present disability was directly caused by the operation for hernia?

"A. My letters to both sides, I said I did not know for sure."

Thus substantial testimony supports the jury's evaluation and factual findings that the straining and retching following the surgery (which was caused by the accident) caused a heart attack while Mr. Spiers was hospitalized so that the pain, worry, mental anguish, shortening of life and permanent disability was a direct consequence of the accident negligently caused by the defendant's insured.

III. Quantum.

It is stipulated that recovery will be limited to $50,000, the policy limit.

Plaintiff Spiers was employed by the railroad at $675.00 per month, so that for instance he has lost approximately $30,000.00 in wages to date. In addition he has an additional working-life expectancy of nearly 10 years assuming retirement at 65, with a future additional loss of wages thus amounting to some $80,000, not discounted. His estimated present and future medical expenses amount to approximately $8,000, and of course his pain and suffering and the mental anguish in knowing that every moment he lives may be his last is also entitled to a substantial award.

Since the minimum award to which the plaintiff under these facts is entitled is far in excess of $70,000, it is unnecessary for us to discuss whether the defendants are entitled to any credit for the amount of $20,000 previously paid to the plaintiff for his injury in settlement of the suit against it, by the Louisiana and Arkansas Railway, the plaintiff's employer, and the jury's award to the plaintiff of the $50,000 sought is accordingly affirmed.[3]

IV. Alternative Prayer for a New Trial.

Alleging prejudicial error in the conduct of the case, the defendants-appellants alternatively pray for a reversal and remand of these proceedings for a new trial. Other grounds previously urged (such as the alleged disqualification of two jurors) not being specified, we will assume such have

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[3] See concurring opinion in Rice v. Traders and General Insurance Company, 114 So. 2d 92, wherein the writer expressed some doubt that such credit by voluntary settlement from potential tortfeasor is available to another tortfeasor cast by judgment. See also Johnson v. Whitefield, La. App. 1 Cir., 89 So. 2d 413 (Syllabus 4).

been abandoned and will discuss briefly only those remaining grounds re-urged by the defendants-appellants in their application for rehearing which was granted.

The defendants-appellants contend that they sustained prejudice by the admission into evidence over their objection of a release executed by the plaintiff and the L & A on June 6, 1958 (P-18). However, the defendants by Article 30 of their answer had pleaded such release as "an absolute bar of any right of recovery herein" in this suit against Consolidated and its insurer, and its admission was of course permissible to show that it was a restricted release specifically reserving rights against Consolidated in the present suit (see Art. 2, Tr. 321). Further, the trial court cautioned the jury to disregard any language which might be construed as indicating negligence on the part of the present defendants. (Tr. 323)

The defendants also complain that over their objection the trial court improperly allowed the examining physicians to testify that when they examined the plaintiff in October, 1956, several days after the accident, he told them that he had sustained the hernia in the present jolting accident in October, thus corroborating his testimony that the hernia resulted from the present accident rather than from trying to step onto the train in September. Aside from cautionary remarks by the trial judge preventing prejudice, we think these to be instances where "a physician may sometimes testify as to the the history of an injury or illness given to him by a patient for the purpose of diagnosis or treatment if the condition related to the injury or illness for which the patient was seeking treatment was relevant to the issues then under inquiry," 20 Am Jr "Evidence" Section 628, p. 531 (1960 Cumulative Supplement, p. 98).

Citing State v. Gailey, 115 So. 613, 165 La. 341, 58 ALR 1, and Billington v. Schaal, 259 P. 2d 634, the appellants further contend that it was error to permit the attorney for the appellant to read from the criminal statutes in his argument to the jury and that the trial court's cautionary remarks did not prevent prejudice. The cited cases are completely inapplicable and do not involve the question under consideration; but even conceding that error is shown, we do not believe that under the circumstances it was prejudicial and constitutes grounds for reversing the verdict of the jury. Miller v. Miller, 160 La. 936, 107 So. 702. "So, **in the absence of prejudice**, the court will not reverse because of the action of counsel in appealing to race prejudice, referring to the poverty or wealth of the parties, reading part of the pleadings to the jury, **reading law to the jury**, ..." 5A CJS "Appeal & Error," Section 1713, p865. (Emphasis ours.)

Taking the record as a whole, we believe that the plaintiff has proved his case by a preponderance of the evidence and that no manifest error is shown in the injury verdict awarding him the full amount of his prayer.

Decree.

For the foregoing reasons the judgment of the trial court is affirmed.

AFFIRMED

LUTHER SPIERS	:	Court of Appeal
vs.	:	First Circuit
CONSOLIDATED COMPANIES, INC., ET AL	:	State of Louisiana

APPEAL FROM THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, HONORABLE JESS JOHNSON, JUDGE, PRESIDING.

Before Ellis, Lottinger, Tate, Herget and Landry

Landry, J., dissenting.

The conclusions herein reached by the majority on the question of proximate cause as relates to the defendant Consolidated Companies, Inc. and its insurer, the Travelers Insurance Co., and on the issue of causal relation between the herniaplasty performed upon plaintiff on October 27, 1956, and the subsequent myocardial infarction sustained by plaintiff compels me to dissent herein.

As I understand the majority opinion on the question of proximate cause, it holds the original opinion rendered herein was in error in concluding the engineer Thornton had the last clear chance to avoid the accident. While I concur in the views of the majority of the Court on the proposition that last clear chance may not be availed of by a co-tort feasor to defeat recovery by a third party, I do not interpret the original opinion as holding the engineer was solely responsible for the accident herein on the basis of last clear chance. The allusion to last clear chance contained in the original opinion was made solely for the purpose of distinguishing between proximate and remote cause. It is elementary that even as

among co-tort feasors negligence, to give rise to a cause of action, must be a proximate cause of the injury resulting therefrom. The rule that the negligence of an individual which renders him liable in damages must constitute a proximate as distinguished from a remote cause of injury is so well established as to hardly admit of argument. The original opinion handed down herein, in my judgment, held in effect that the employees of defendant Consolidated Companies, Inc. were free of negligence constituting a proximate cause of the injury and their negligence, if any, was only a remote cause thereof and, therefore, not actionable. The initial opinion, as I appreciate it, simply held that negligence of the engineer was the sole proximate cause of the accident.

In my considered judgment the evidence in this case fails to show the employees of Consolidated Companies, Inc. were negligent in parking the truck across the track in view of the unusual and peculiar circumstances existing in this case. It is universally recognized and held that negligence is a matter of fact, which must be determined in each individual case, in the light of all attending circumstances. C.J.S., Vol. 65, Verbo Negligence, Sec. 1 (5), Page 312. Additionally, it is the law of this state that to give rise to a cause of action for injury resulting from alleged negligence, the conduct of the defendant must be the proximate as distinguished from the remote cause of the injury received. The generally accepted definition of and distinction between proximate and remote cause appears to be well stated in Am. Jur., Vol. 38, Verbo Negligence, Sec. 50, Page 695, as follows:

> "Perhaps the best, as well as the most widely quoted, definition is the following: The proximate cause of an injury is that cause, which, in natural and continuous sequence, unbroken by any efficient intervening cause,

produces the injury, and without which the result would not have occurred. Other definitions which have received judicial approval are: that act or omission which immediately causes or fails to prevent the injury; an act or omission occurring or concurring with another, without which act or omission the injury would not have been inflicted; the cause which leads to, produces, or contributes directly to, the production of the injury of which complaint is made; the efficient cause; the one that necessarily sets the other causes in motion, and brings about the result without the intervention of any force started and working actively from a new and independent source. Proximate cause is also defined as the primary moving cause, or the predominating cause, from which the injury follows as a natural, direct, and immediate consequence and without which it would not have occurred. A more elaborate definition is as follows: The proximate legal cause is that acting first and producing the injury, either immediately or by setting other events in motion, all constituting a natural and continuous chain of events each having a close causal connection with its immediate predecessor, the final event in the chain immediately effecting the injury as a natural and probable result of the cause which first acted, under such circumstances that the person responsible for the first event should, as an ordinarily prudent and intelligent person, have reasonable ground to expect at the moment of his act or default that an injury to some person might probably result therefrom. Other definitions incorporate the idea that in order to establish that a negligent act or omission was the proximate cause of an injury, it must be shown that the injury was foreseen or that it reasonably should have been foreseen as the natural and probable result of the negligence, although, as hereinafter stated, according to a view which is accepted by good modern authorities, the question whether the particular consequences of an act or omission were foreseen or should have been

foreseen is involved not so much in determining whether an injury is the proximate result of such act or omission, as it is in determining whether the act or omission was negligent. Since proximate cause as an element of liability for negligence is not necessarily dependent upon nearness in time or distance, with which proximity is most readily associated, but is referred to as that cause without which the accident could not have happened, perhaps "primary" or "efficient" would be more descriptive of the cause of which the law takes cognizance than "proximate." A change in terminology, however, would not make the tests of proximate cause easier. It would still be necessary to follow back through a chain of circumstances, which are sometimes involved and perplexing, to ascertain the one of which it can be said "except for" this the injury would not have occurred.

By remote cause is intended that which may have happened, and yet no injury have occurred, notwithstanding no injury could have occurred if it had not happened; that cause which some independent force merely took advantage of to accomplish something not the probable or natural effect thereof."

Thus it would appear that the question of whether the action of the employees of defendant Consolidated Companies, Inc. in parking a truck so as to foul or obstruct the main line of the railroad was negligence constituting a proximate cause of the accident, is a question of fact to be decided in the light of the circumstances of record in the instant case. The record shows without contradiction that in pursuance of its agreement with the railway company, defendant Consolidated Companies, Inc. proceeded for a period of approximately 30 years to use the right of way in question virtually at will as though it were the owner thereof. It is undisputed that on numerous occasions trains were required to either reduce

speed or come to a complete stop in order to avoid striking trucks parked across the railway tracks. That this condition and situation existed to the knowledge and acquiescence of and without complaint from officials and employees of the railway company, is undisputed in the record. The engineer on the train in question was aware of this fact as was plaintiff himself. The locale of the accident was in a commercial district of the capital city of this state and the conditions attending the locale was such as to cry out for caution on the part of the operators of the train. Not only was the area one in which a very slow rate of speed was in effect for trains but approaching the locale from the south the engineer was faced with a curve which to some extent blocked visibility. Indeed one of plaintiff's principal contentions seems to be that the curve was of such degree that it prevented the engineer from seeing the truck until he was in such close proximity thereto that he did not have time to stop. In my judgment this all the more graphically demonstrates the engineer's negligence since it is shown he was familiar with the fact that trucks were parked on the tracks from time to time and if his view of said vehicles was blocked as the majority opinion maintains, this circumstance all the more called for extra caution on his part as he had every reason to anticipate the presence of an obstruction. We are not here concerned with the unexpected blocking of a railway track by a person at a place and time wherein such impediment may not be reasonably anticipated on the part of the operators of a train but with an accident which occurred in a congested, commercial area of a metropolis where obstructions had occurred over a period of many years to the knowledge of the engineer in question which circumstances, in my opinion, are certainly to be considered in determining the alleged negli-

gence of defendant Consolidated Companies, Inc. Considering all of the circumstances of the case at bar, it is my conclusion that the negligence of the employees of Consolidated Companies, Inc., if any, was a remote and not a proximate cause of the accident in question, the sole and only proximate cause thereof being the negligence of the engineer Thornton in failing to timely stop the train.

In finding that a causal connection exists between plaintiff's disability which is admittedly due to the heart condition which developed subsequent to plaintiff's operation, the majority view expressed herein relies very heavily upon the manifest error doctrine which holds that the finding of a trial court on an issue of fact will not be disturbed unless it appears manifestly erroneous. In my humble opinion, the majority in so concluding in the case at bar has carried the doctrine of manifest error to the extreme by in effect holding that so long as any evidence appears of record to support the finding of fact arrived at by the trial court, said finding should not be set aside. I believe that the serious error committed by the majority herein lies in their conclusion that a causal relationship between the operation and plaintiff's heart condition is supported by a preponderance of the medical evidence. More specifically, I believe the error of the majority lies in the complete reliance upon the testimony of Dr. Williams which, as I shall hereinafter attempt to show, is contrary to the preponderance of the evidence on the issue contained in the record of this case. Dr. Williams was admittedly not a cardiologist. Upon plaintiff's complaining of chest pains and vomiting in the hospital following the operation, Dr. Williams, thinking that plaintiff might be experiencing a myocardial infarction, summoned Dr. Reynolds, a cardiologist, in consultation. From this point on it was Dr. Reynolds and not Dr. Williams who

became the attending physician insofar as plaintiff's care and treatment relative to a possible heart condition was concerned. The majority relies very heavily upon the fact that Dr. Williams was the attending physician and, therefore, his opinion was entitled to greater weight than that of Dr. Reynolds. Such, however, is not borne out by the record for the testimony clearly shows that Dr. Williams made no attempt to diagnose or treat plaintiff's alleged heart condition and that from the moment that he was called in consultation (which incidentally occurred on the same day plaintiff is supposed to have sustained the attack), Dr. Reynolds, a cardiologist, has had plaintiff constantly under his treatment and care and in my judgment in such circumstances, the testimony of Dr. Reynolds is entitled to far greater weight than that of Dr. Williams. The opportunity for observation on the part of Dr. Reynolds was at least equal if not superior to that of Dr. Williams and his knowledge of cardiology is without doubt greater than that of Dr. Williams. We are not here concerned with the situation in which the testimony of a less skilled attending general practitioner is accorded greater weight than that of a specialist who only examines a patient for the purpose of giving an opinion. We have involved here circumstances wherein the specialist has been the attending physician and the medical authority with inferior knowledge has made no pretense of diagnosing or treating the patient yet the opinion of the latter is accorded greater weight than the former.

Although I concede the testimony of the two cardiologists, namely, Drs. Stotler and MacCurdy are not equal in weight to that of Dr. Williams inasmuch as the former expressed opinions predicated solely upon examination and consideration of plaintiff's electrocardiograms and hospital rec-

ords and charts, their testimony is nevertheless in the record and entitled to some consideration.

The testimony of Drs. Stotler and MacCurdy clearly shows (for medical reasons which they explained) that in their opinion, trauma whether induced by vomiting, retching or otherwise cannot precipitate a myocardial infarction and that the infarction sustained by plaintiff was the result of his preexisting coronary insufficiency which was not aggravated by the surgery performed.

In my opinion the testimony of Dr. Reynolds, supported, corroborated and confirmed by that of Drs. Stotler and MacCurdy, represents the clear preponderance of medical evidence on the question of the relationship between plaintiff's operation and heart condition and the majority opinion sustains a finding of fact contrary thereto.

Although many decisions of trial courts on questions of fact have been supported and affirmed on the basis of the "manifest error doctrine," I know of none in which such a result has occurred in a case where the finding was not supported by a preponderance of the evidence. In this connection it has been held that it is occasionally easier to perceive fallacies and inconsistencies in the record by a comparison of the various portions of the transcribed testimony with other pertinent portions than it is to accurately observe and catalog them while listening to oral evidence of the various witnesses who testified during the course of a trial. Owens vs. Felder (La. App. Orl.) 35 So. 2d 671. See also Anderson et al vs. Morgan City Canning Co. 73 So. 2d 196.

I believe it is the established jurisprudence of this state that where a question of the preponderance of the evidence

or burden of proof is presented, the appellate court in reviewing the action of a trial court must rely upon its own estimate of the testimony and make its own analysis thereof in determining whether the burden of proof incumbent upon plaintiff has been met. Succession of Fields, 222 La. 310, 62 So. 2d 495. In the Succession of Fields, supra, the following pertinent language appears:

> "Counsel for defendant makes reference to 500 cases or more to the effect that a judgment of the trial court on questions of fact will not be disturbed on appeal unless manifestly erroneous. That is no doubt true when there is conflict in the testimony or the credibility of the witnesses is at issue, but in this particular case the question as presented before us is one of the sufficiency or the preponderance of the testimony rather than the credibility of the witnesses. In a situation such as this, it has been held that the trial court has no advantage over the appellate court in weighing the testimony and giving it proper effect. A case in point is that of Jordan v. Jordan, 175 La. 468, 143 So. 377. We regard the comments of the Court in that case as strongly pertinent here and conclude that the trial judge in this case manifestly erred . . . ."

For the reasons herein set forth, I respectfully dissent.

LUTHER SPIERS	:	State of Louisiana
vs.	:	Court of Appeal
CONSOLIDATED COMPANIES, INC., ET AL	:	First Circuit

Appeal from the Nineteenth Judicial District Court in and for the Parish of East Baton Rouge, Louisiana, Honorable Jess Johnson, Presiding Judge.

Before ELLIS, LOTTINGER, TATE, HERGET and LANDRY, Judges. Lottinger, Judge, dissenting.

I respectfully dissent from the majority herein and I concur fully with the views expressed in the dissent of Judge Landry.

APPENDIX "E"

SUPREME COURT OF LOUISIANA

No. 45521

LUTHER SPIERS

Versus

CONSOLIDATED COMPANIES, INC., ET AL.

In Re Consolidated Companies, Inc., et al. Applying for Certiorari, or Writ of Review.

HAWTHORNE, J.

In this case we are called upon to review a judgment of the Court of Appeal which affirmed a judgment of the district court awarding to plaintiff Luther Spiers, a conductor for the Louisiana & Arkansas Railway, $50,000.00 for personal injury sustained by him. The defendants are Consolidated Companies, Inc., and its liability insurer, Travelers Insurance Company.

Plaintiff in brief filed in this court states that the original opinion of the Court of Appeal "contains a detailed and fair statement of the case and is now reported as Spiers v. Con-

solidated Companies, 125 So. 2d 795";[1] hence we shall set forth only such facts as may be necessary for our decision in the case.

Defendant Consolidated Companies, Inc., maintained and operated through a subsidiary a large warehouse on the west side of the L. & A. right of way in the City of Baton Rouge. The L. & A. constructed a spur or side track along the western edge of its right of way parallel and adjacent to the warehouse in order to provide direct access to railway facilities for defendant and others. The area or space between the spur and the mainline tracks was 12.8 feet. In 1933, approximately 27 years ago, the railway and the defendant Consolidated entered into an agreement which provided with reference to this space:

"13. Carrier agrees to permit Shipper and assigns to use the space between Carrier's main line and the proposed spur track as a private driveway between the hours of 6 A.M and 6 P.M., it being expressly understood that this shall not constitute a dedication of this property to public use but is for the sole benefit of Shipper and assigns. Any vehicle using driveway shall at all times have a driver in charge so as to immediately move said vehicle on the approach of trains or as otherwise necessary * * *."

The space covered by this agreement, situated between the spur or side track and the main line, was within the L. & A. railroad yards in the commercial district of the City of Baton Rouge. The maximum legal speed limit for trains in this area

[1] The original opinion in the Court of Appeal written by Judge Landry reversed, annulled, and set aside the judgment of the district court in favor of plaintiff. On rehearing the Court of Appeal through Judge Tate affirmed the district court's judgment.

was eight miles per hour, and the rules of the railroad provided that trains should be operated in the yard limits in such a manner that the engineer should be able to stop short of obstructions or unlined switches.

Pursuant to the agreement between Consolidated and the railroad, for 23 years the space between the spur line and the main line was used not only by the trucks of Consolidated but also by those of other shippers and even the L. & A. Railway itself for loading and unloading freight from boxcars on the railway siding, and during this time it is evident that innumerable cars were loaded and unloaded. Due to the size of this area only very small trucks could use it for its intended purpose without obstructing the main track of the L. & A. Railway. Large trucks, of course, blocked the main line. During all these years trains, including freight trains, passenger trains, and switch engines, had occasion to stop innumerable times to permit trucks to be removed from the main line of the railway. The officials and employees of the railroad, including Spiers himself, knew of this situation and accepted it without complaint, and this is undisputed. The loading and unloading of boxcars at this particular site, pursuant to the agreement and with the full consent and approval of the railroad, had gone on for over 23 years without injury to anyone.

Because of the position of the spur track in relation to the main line, the blocking of the main line when the area was being used was inevitable, and it is clear to us that the agreement between the railway and the defendant Consolidated contemplated the blocking of the main line because the use of the area as a private driveway was limited to the hours of daylight from 6:00 a.m. to 6:00 p.m., because the agreement provided that a vehicle using the driveway should at all

times have a driver in charge so that it could be immediately moved on the approach of trains, and also because the railroad had a right to install gates which Consolidated was to keep closed except when the space was in use for Consolidated's purposes. That the blocking of the main line was contemplated is further established by the fact that for a period of 23 years on innumerable occasions the line was blocked with the full knowledge, consent, and approval of the railroad, for certainly the railroad would not have permitted this practice to become established if the blocking of its line had not been contemplated by the agreement. Furthermore, if the space itself had been large enough to permit the leading and unloading of boxcars without blocking the main line, the trains could have passed even when a truck was using the space, and the provisions in the portion of the agreement which we have quoted would have been unnecessary.

Plaintiff Luther Spiers was a conductor in charge of L. & A. Freight Train No. 42 on its regular run from New Orleans to Kansas City. On the date of the accident, October 16, 1956, this train, consisting of over 100 cars, was proceeding north, and as it entered the railway yards it was travelling, according to the engineer as closely as he could estimate, at eight miles per hour.[2] The engineer stated that as he rounded a curve a few hundred feet south of defendant's warehouse, he observed that the main line was blocked by a truck;[3] that to avoid striking this truck it became necessary for him to make an emergency stop. Plaintiff, the conductor, was riding in the caboose, and the jar caused by the emer-

[2] Plaintiff Spiers in a deposition testified that at the time of the accident the train was proceeding at a speed of 10, 12, or 15 miles per hour.

[3] This truck was owned by Consolidated and was in the charge of one of its employees.

gency stop knocked him from his seat. According to plaintiff, this fall caused a strain to his right side, and because of this he developed a right inguinal hernia. On October 27, 1956, 11 days after the accident, he underwent surgery for the correction of this hernia. On November 1, 1956, he was discharged from the hospital, and nine days later, on November 9, he suffered a heart attack which has rendered him totally and permanently disabled.

After the accident plaintiff instituted suit in the United States district court to recover from the railroad a large sum for injuries sustained by him in the course of his employment. In his petition he alleged that the accident with which we are here concerned was caused by the negligence of the railroad in permitting its main line to be blocked by a truck or other vehicle of one of its customers at or near the end of a curve, where to the knowledge of the railway, its agents, servants, and employees it would be difficult for an engineer to see a vehicle blocking the main line until the train was near it; that the railway permitted the truck to be left standing on the main line which was not a street or crossing, and that this constituted negligence; further, that the railway engineer on the train was negligent in failing sooner to see the truck and in travelling at the speed at which he was operating, and was also negligent in the manner in which he suddenly and abruptly stopped the train, causing plaintiff to be thrown forward and sustain injuries. In a compromise settlement the railway paid the plaintiff $20,000.00. Plaintiff reserved his right against Consolidated but reduced his demand against Consolidated to $50,000.00, the amount of liability insurance carried by Consolidated with

Travelers Insurance Company. This requirement was made by the railroad to lessen any friction existing between it and Consolidated, one of its valued shippers.

The basis of plaintiff's suit against Consolidated is either that disabling heart attack was the direct result of the injury sustained in the accident of October 16, 1956, which was caused by defendant's negligent blocking of the railroad line, or that the negligent blocking of the main line of the railway by defendant's truck caused the emergency stop of the train, that the emergency stop caused his fall, that the full caused the hernia, that the hernia necessitated the operation, and that the operation brought on the disabling heart attack.

Defendant contends that because of the unusual and peculiar circumstances which existed in this case it was not guilty of negligence, or that even if it were negligent, its negligence was not as a matter of law the proximate and contributing cause of the accident; that the negligence of the engineer in failing to make a gradual, normal stop when he had ample time to do so was the sole proximate cause of the accident; and also that plaintiff has failed to prove by a preponderance of the evidence a causal relationship between the accident, the operation, and the disabling heart attack.[1]

The case in the district court was tried before a jury, which awarded plaintiff $50,000.00. The district judge overruled defendant's motion for a new trial, and stated that there was some evidence to support the jury's verdict although personally he might have some doubt about it, and that he would not reduce the award although he considered it generous.

[1] Defendant also contends that plaintiff has not discharged the legal burden of proving that a hernia resulted from the accident of October 16. We think, however, that this has been proved, but it is immaterial to our decision of the case.

The Court of Appeal on original hearing reversed the judgment of the lower court and held that the negligence of the driver of the truck was not the proximate cause of the accident, and that the negligence of the engineer was the sole proximate cause of the accident. Judge Tate dissented, being of the opinion that the majority had correctly stated the law but basing his dissent on his interpretation of certain facts found by the majority. He subsequently wrote what is styled an "addendum to dissent," in which he stated that he erred in his original dissent when he said that he agreed with the legal principles announced by the majority and reiterated his disagreement with the majority's finding of fact. A rehearing was granted, and the court, with Judge Tate as its organ, concluded that the driver of the truck was negligent, and that as a matter of law his negligence was a contributing cause of the plaintiff's injury. In arriving at this conclusion the court cited and relied on a decision of this court, Jackson v. Jones, 224 La. 403, 69 So. 2d 729, and held, in effect, that Consolidated's truck driver should have foreseen that the obstructing vehicle would hamper the inherently dangerous operation of the heavy and hard-to-stop railway trains and would cause a collision or the dangerous maneuver of a sudden train stop to avoid a collision. Judge Landry and Judge Lottinger dissented.

Generally the intentional blocking of the main line of a railway is negligence, but the question posed here is whether defendant was negligent under the facts and circumstances of the instant case. In other words, we must decide whether the defendant or its employees could or should have foreseen the risk or danger to the plaintiff.

The law is well settled that a person cannot be held responsible on the theory of negligence for an injury from an act or omission on his part unless it appears that he had knowledge, or reasonably was chargeable with knowledge, that the act or omission involved danger to another. See 38 Am. Jur., Negligence, sec. 23, p. 665. In the case of Anderson v. London Guarantee & Accident Co. (La. App.), 36 So. 2d 741, the Court of Appeal cited numerous cases of this court on the subject, saying:

"• • • Our jurisprudence is replete with cases which clearly define the degree of care required of an actor, from some of which we cite extracts as follows:

" • • •

" ' "Negligence" has been defined to be the failure to use such care as is necessary to avoid a danger **which should have been anticipated**, by reason of which the plaintiff has suffered injury. Lopes v. Sahuque, 114 La. [1004], 1011, 38 So. 810; Baltimore & P. R. Co. v. Jones, 95 U. S. 439, 441, 24 L.Ed. 506; 6 Cyc. 591.

" '**A defendant can only be required to guard against a probable or anticipated danger.** New Orleans & N. E. R. Co. v. McEwen & Murray, 49 La. Ann. 1184, 1196, 22 So. 675, 38 L.R.A. 134 • • •.' Caillier v. New Orleans Railway & Light Company, 11 La. App. 93, 120 So. 76, 78.

" 'See also, Brandt v. New Orleans Public Service, Inc., 15 La. App. 391, 132 So. 244.

" 'The common usage of a business or occupation is frequently stated to be a test of care or negligence, and ac-

cordingly, conformity to custom or usage is very generally regarded as a matter proper for consideration in determining whether or not sufficient care has been exercised in a particular case, * * *.' 45 Corpus Juris 706.

"The Supreme Court of this State in New Orleans & N. R. R. Company v. McEwen & Murray, 49 La. Ann. 1184, 22 So. 675, 680, 38 L.R.A. 134, said:

" ' "Negligence consists in a failure to provide against the ordinary occurrences of life, and **the fact that the provision made is insufficient as against an event such as may happen once in a lifetime**, or perhaps twice in a century, **does not * * * make out a case of negligence** upon which an action in damages will lie." '

"In the same case our Supreme Court quoted with approval from the case of Huber v. LaCrosse City Railway Company, 92 Wis. 636, 66 N.W. 708, 31 L.R.A. 583, 53 Am. St. Rep. 940, decided by the Supreme Court of Wisconsin, affirming what it had said in Block v. Milwaukee St. Railway Company, 89 Wis. 371, 61 N.W. 1101, 27 L.R.A. 365, 46 Am. St. Rep. 849, as follows:

" ' **"The negligence is not the proximate cause of the accident, unless * * * under all the circumstances, the accident might have been reasonably foreseen by a man of ordinary intelligence and prudence.** It is not enough to prove that the accident is the natural consequence of the negligence. It must also have been the probable consequence. * * * **A mere failure to ward against a result which could not have been reasonably anticipated is not actionable negligence.**" ' Keller v. Stevenson, La. App., 6 So. 2d 569."

For over 20 years Consolidated and its customers as well as those of the railroad unloaded goods from boxcars on this spur or side track, and during this period the L. & A. engineers brought their trains to a normal stop whenever it was necessary to permit trucks blocking the main line to be moved. Consolidated and its employees certainly could not have been aware of any foreseeable danger inherent in their activities, and could not have been expected to anticipate the train's emergency stop which caused plaintiff's injury. Therefore, considering all the facts and circumstances of this case which we have set out above, we do not think that defendant Consolidated was negligent in blocking the main line of the railway.

In the Court of Appeal on rehearing Judge Landry in his dissent, after stating that the evidence in this case failed to show that the employees of Consolidated were negligent in parking their truck across the tracks in view of the unusual and peculiar circumstances existing in the case, said that if they were negligent, their negligence was a remote and not a proximate cause of the accident, and that the sole and only proximate cause of the accident was the negligence of the engineer in failing to timely stop the train.

Since we have concluded that defendant was not negligent, plaintiff cannot recover, and there is no necessity for us to discuss defendant's contention that if it was negligent, its negligence as a matter of law was not the proximate cause of the accident. As to this contention the majority opinion of the Court of Appeal on rehearing assumed negligence on the part of the railroad engineer which contributed to the accident, but concluded that defendant's act in blocking the main railway line created a foreseeable risk to others, making it liable notwithstanding the negligence of the railroad

engineer. The Court of Appeal cited Jackson v. Jones, 224 La. 403, 69 So. 2d 729, which is full authority for the legal principle there announced:

"The determination of the proximate or efficient cause of an accident, as distinguished from the remote cause, is sometimes difficult of practical application and often turns 'upon the very nicest discriminations.' The Louisiana Mut. Ins. Co. v. Tweed, 7 Wall., U.S., 44, 19 L.Ed. 65. However, in matters like this, the criterion governing liability is whether the person creating the danger could or should reasonably have foreseen that the accident might occur. If such were the case, then he is liable notwithstanding the intervening cause. See 38 Am.Jur. Verbum 'Negligence' § 70, pages 726, 727."

This principle of law, however, is not applicable to the facts of this case, under which we have concluded that the acts of Consolidated did not create a foreseeable danger to others and that its agents could not have been expected as reasonable, prudent persons to anticipate the train's emergency stop which caused plaintiff's injury. If we should, however, assume that defendant was negligent, there would still remain in our mind serious doubt whether such negligence was the proximate cause of the accident; and we would probably conclude, as did Judge Landry in his dissent, that the railway was negligent and that its negligence was the proximate cause of the accident.

Since we have concluded that there is no liability on the defendant, we need not discuss its contention that the plaintiff has failed to prove by a preponderance of the evidence a causal relationship between the accident, the operation, and the disabling heart attack.

For the reasons assigned the judgment of the Court of Appeal affirming the judgment of the district court is annulled, reversed, and set aside, and plaintiff's suit is dismissed at his costs.

LUTHER SPIERS	:	No. 45,521
v.	:	Supreme Court
CONSOLIDATED COMPANIES, INC., ET AL.	:	of Louisiana

SANDERS, Justice (Dissenting).

In my opinion, the Court of Appeal correctly concluded that the intentional act of defendant's truck driver in obstructing the main railroad line constituted negligence notwithstanding the contract between defendant and the L. & A. Railway and prior practice. Compare Englert v. New Orleans Ry. & Light Co., 128 La. 473, 54 So. 963.

As I view the case, the most serious issue posed is whether the negligence of the defendant was a proximate, or juridical, cause of the harm to plaintiff. This question is not free from difficulty. In this state and elsewhere, the subject of responsible causation is obscured by a smog of empty phrases and verbal intricacies. See Blanks v. Saenger Theaters, La. App., 138 So. 883, 888; Green, Rationale of Proximate Cause (1927) pp. 195-202. It is difficult, if not impossible, to reconcile the decisions that have dealt with it. See II Louisiana Annotations to the Restatement of the Law of Torts (1941), Sections 431, 447; 6 Tulane Law Review 476.

In the instant case, the negligence of the defendant was a substantial factor in producing the harm to the plaintiff. The

intervening negligence of the Railway was not a superseding cause for the employees of the defendant should have reasonably foreseen that an emergency stop of a train might occur. Jackson v. Jones, 224 La. 403, 69 So. 2d 729. The defendant cannot be absolved from responsibility merely because the negligence of the Railway contributed to the result.

I respectfully dissent.